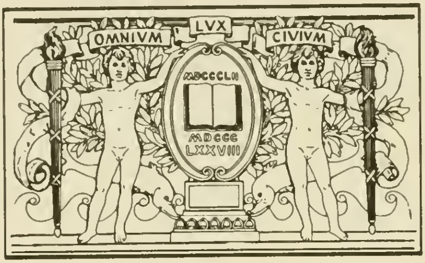

OMNIVM
LVX
CIVIVM
MDCCCLII
MDCCC
LXXVIII

BOSTON
PUBLIC
LIBRARY

MARINE MAMMALS

KF27
.M447
1977

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT
OF THE
COMMITTEE ON
MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES
NINETY-FIFTH CONGRESS
FIRST SESSION
ON
MARINE MAMMAL OVERSIGHT
FEBRUARY 17, 1977

TUNA-PORPOISE REGULATIONS
MARCH 2, 1977

MARINE MAMMAL AUTHORIZATION—H.R. 4740
MARCH 15, 1977

Serial No. 95–8

Printed for the use of the Committee on Merchant Marine and Fisheries

U.S. GOVERNMENT PRINTING OFFICE
94-886 WASHINGTON : 1977

COMMITTEE ON MERCHANT MARINE AND FISHERIES

JOHN M. MURPHY, New York, *Chairman*

THOMAS L. ASHLEY, Ohio
JOHN D. DINGELL, Michigan
PAUL G. ROGERS, Florida
WALTER B. JONES, North Carolina
ROBERT L. LEGGETT, California
MARIO BIAGGI, New York
GLENN M. ANDERSON, California
E (KIKA) DE LA GARZA, Texas
RALPH H. METCALFE, Illinois
JOHN B. BREAUX, Louisiana
FRED B. ROONEY, Pennsylvania
BO GINN, Georgia
GERRY E. STUDDS, Massachusetts
DAVID R. BOWEN, Mississippi
JOSHUA EILBERG, Pennsylvania
RON DE LUGO, Virgin Islands
CARROLL HUBBARD, JR., Kentucky
DON BONKER, Washington
LES AuCOIN, Oregon
NORMAN E. D'AMOURS, New Hampshire
JERRY M. PATTERSON, California
LEO C. ZEFERETTI, New York
JAMES L. OBERSTAR, Minnesota
WILLIAM J. HUGHES, New Jersey
BARBARA A. MIKULSKI, Maryland
DAVID E. BONIOR, Michigan
DANIEL K. AKAKA, Hawaii

PHILIP E. RUPPE, Michigan
PAUL N. McCLOSKEY, JR., California
GENE SNYDER, Kentucky
EDWIN B. FORSYTHE, New Jersey
DAVID C. TREEN, Louisiana
JOEL PRITCHARD, Washington
DON YOUNG, Alaska
ROBERT E. BAUMAN, Maryland
NORMAN F. LENT, New York
DAVID F. EMERY, Maine
ROBERT K. DORNAN, California
THOMAS B. EVANS, JR., Delaware
PAUL S. TRIBLE, JR., Virginia

CARL L. PERIAN, *Chief of Staff*
ERNEST J. CORRADO, *Chief Counsel*
FRANCES STILL, *Chief Clerk*
W. PATRICK MORRIS, *Chief Minority Counsel*

SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT

ROBERT L. LEGGETT, California, *Chairman*

JOHN D. DINGELL, Michigan
FRED B. ROONEY, Pennsylvania
BO GINN, Georgia
DAVID R. BOWEN, Mississippi
CARROLL HUBBARD, JR., Kentucky
JAMES L. OBERSTAR, Minnesota
PAUL G. ROGERS, Florida
MARIO BIAGGI, New York
GLENN M. ANDERSON, California
E (KIKA) DE LA GARZA, Texas
JOHN B. BREAUX, Louisiana
GERRY E. STUDDS, Massachusetts
DON BONKER, Washington
LES AuCOIN, Oregon
WILLIAM J. HUGHES, New Jersey
DAVID E. BONIOR, Michigan
DANIEL K. AKAKA, Hawaii

JOHN M. MURPHY, New York (ex officio)

EDWIN B. FORSYTHE, New Jersey
PAUL N. McCLOSKEY, JR., California
DON YOUNG, Alaska
ROBERT E. BAUMAN, Maryland
DAVID F. EMERY, Maine
ROBERT K. DORNAN, California
THOMAS B. EVANS, JR., Delaware
PAUL S. TRIBLE, JR., Virginia

PHILIP E. RUPPE, Michigan (ex officio)

NED P. EVERETT, *Counsel*
ROBERT D. THORNTON, *Counsel*
RICHARD E. GUTTING, JR., *Counsel*
GEORGE J. MANNINA, JR., *Minority Professional Staff*

CONTENTS

MARINE MAMMAL PROTECTION OVERSIGHT

Page
Hearing held February 17, 1977 1
Statement of—
Alverson, Franklin G., vice president, Living Marine Resources, Inc., and research director, Porpoise Rescue Foundation 65, 97
Bozzo, Jim, secrerary-treasurer, Fishermen's Union, AFL-CIO 65
Brewer, William C., Jr., general counsel, NOAA 8
Butler, William A., Washington counsel, Environmental Defense Fund 113
Prepared statement 114
Cary, Harold, Ocean Fisheries, Inc 65
Prepared statement 69
Chapman, Dr. Douglas G., chairman, Marine Mammal Commission 30
Corrada, Hon. Baltasar del rio, Resident Commissioner, Commonwealth of Puerto Rico 62
Edney, Steve, president, United Cannery Workers, AFL-CIO 65
Eisenbud, Robert, general counsel, Marine Mammal Commission 30
Felando, August, on behalf of the American Tunaboat Association 65
Prepared statement 77
Fensterwald, Bud, counsel, Committee for Humane Legislation and Friends of Animals 131
Forkan, Patricia, program coordinator, Humane Society of the United States 143
Prepared statement 151
Fox, Dr. William, chief, Oceanographic Fisheries Resource Division, Southwest Fisheries Center, La Jolla, Calif 8
Jorge, Capt. Manuel, captain of the *Elizabeth* C. J 65
Kaufmann, Milton, on behalf of the Connecticut Cetacean Society, Fund for Animals, International Fund for Animal Welfare, U.S.A 90
Meihbohm, Winfred H., Associate Director, National Marine Fisheries Service, NOAA 8
Mulligan, John, executive director, Tuna Research Foundation 97
Pollock, Howard, Deputy Administrator, NOAA 8
Prior, Karen, consultant, Porpoise Rescue Foundation 97
Prepared statement 98
Royal, John J., Fishermen and Allied Workers' Union of San Pedro and San Diego, Calif., and International Longshoremen's and Warehousemen's Union 60
Schoning, Robert W., Director, National Marine Fisheries, NOAA 8
Silva, Capt. Manuel, president, American Tunaboat Association 65
Stevens, Christine, secretary, Society for Animal Protective Legislation 152
Prepared statement 152
Tarentino, Jack, president, Fishermen's Union, AFL-CIO 65
Thompson, Joseph A., president, Seavision Productions 65
Tobin, Patrick, International Longshoremen's and Warehousemen's Union 61
Wallace, David H., Associate Administrator for Marine Resources, NOAA 8

Additional material supplied—
  Fensterwald, Bernard:
    Concluding brief of Friends of Animals, Inc., and the Committee for Humane Legislation, Inc .... Page 132
    Proposed amendments to the Marine Mammal Protection Act 137
  Forkan, Patricia: KIND, crusade to save porpoises 146
  Marine Mammal Commission:
    Exceptions of the Marine Mammal Commission dated January 28, 1977 46
    Report on the Tuna-Porpoise Cruise to the Marine Mammal Commission by Warren E. Stuntz, Ph. D 33
    Report on Tuna-Porpoise Cruise 38
  NOAA:
    Foreign incidental taking permit applications under the Marine Mammal Protection Act, table 18
    Plan submitted by the Department of Commerce for the enforcement of the Marine Mammal Protection Act in compliance with the order of the U.S. court of appeals dated February 3, 1977 20
    Relationship between U.S. and non-U.S. catch of yellowfin tuna and porpoise mortality in the Eastern Tropical Pacific Ocean—1975 28
Communications submitted—
  Twiss, John R.:
    July 30, 1974 to Robert W. Schoning 123
    November 18, 1975 to Robert W. Schoning 59
    Letter dated January 6, 1977 to Robert W. Schoning 51
    July 19, 1976 to Robert W. Schoning enclosing a memorandum 53
    July 27, 1976 to Robert W. Schoning 53
    September 14, 1976 to Dr. Robert W. Schoning 52
  Brennan, James W., Deputy General Counsel, NOAA, letter to John Twiss dated January 24, 1977 51
  Meeker, Leonard C., letter to Milton Kaufmann dated February 17, 1977 93
  Mendes, Norman A., letter dated January 31, 1977 with enclosure entitled, "Distribution to 170 Certificate Holders" 156
  Schoning, Robert W., director, NOAA,
    Letter dated: September 7, 1976 52
    November 24, 1975 to John R. Twiss 53

TUNA-PORPOISE REGULATIONS

Hearing held March 2, 1977 161
Statement of—
  Alverson, Franklin G., research director, Porpoise Rescue Foundation 215
    Prepared statement 273
  Brewer, William, General Counsel, NOAA 162
  Butler, William A., General Counsel, Environmental Defense Fund 197
    Prepared statement 194
  Cary, Harold F., general manager, Ocean Fisheries, Inc 269
  Chapman, Douglas, chairman, Marine Mammal Commission 243
  Dingell, Hon. John D., a Representative in Congress from the State of Michigan 162
  Drozak, Frank, executive vice president, Seafarers International Union of North America, AFL–CIO 215
    Prepared statement 214
  Edney, Steve, president, United Cannery Industrial Workers 191
  Eisenbud, Robert, counsel, Marine Mammal Commission 243
  Felando, August, executive director, American Tunaboat Association 215
  Fensterwald, Bud, counsel, Committee for Humane Legislation 250
  Kaufmann, Col. Milton M., president, Monitor, Inc 197
  Medina, Capt. Joseph 215
  Mulligan, John, executive director of the Tuna Research Foundation 215

Statement of—Continued

Page
- Royal, John, secretary of Fishermen's Local No. 33, International Longshoremen and Warehousemen's Union 215
- Schoning, Robert M., Director, National Marine Fisheries Service 162
- Singer, Mark M., president, National Food Brokers Association 281
- Stevens, Christine, secretary, Society for Animal Protective Legislation 249
- White, Dr. Robert M., Administrator, NOAA 162

Additional material supplied—

- American Tunaboat Association, charts showing distribution of porpoise 235
- Everett, Ned P., petition by the International Purse Seiner Fleet from the "World Wildlife Fund" dated Nov. 29, Dec. 1, 1976 269
- Fensterwald, Bud:
  - Certificate of service 262
  - Memorandum in support of motion for preliminary injunction dated March 2, 1977 253
  - Motion for preliminary injunction dated March 2, 1977 251
  - Order 261
- Kaufmann, Milton:
  - Eastern Pacific yellowfin tuna regulatory area, charts 208
- NOAA:
  - Estimated effect of a fleet-funded 100 percent observer program on retail canned tuna prices 179

Communications submitted—

- Blatt, Herbert L., assistant general counsel, NOAA, letter to Robert Eisenbud dated February 17, 1977 247
- Kimball, Thomas L., executive vice president, National Wildlife Federation, letter dated March 11, 1977 with an enclosure entitled, "Killing of Porpoises" 266
- Meeker, Leonard C.: Letter of February 17, 1977, to Col. Milton M. Kaufmann 268

MARINE MAMMAL PROTECTION AUTHORIZATION

- Hearing held March 15, 1977 283
- Text of H.R. 4740 284
- Departmental report from Interior 285

Statement of—

- Bavin, Clark, Chief, Division of Law Enforcement, Fish and Wildlife Service, Department of Interior 304
- Blatt, Herbert L., National Marine Fisheries Service 286
- Bonner, Rupert, Marine Mammal Coordinator, Office of Wildlife Assistance, U.S. Fish and Wildlife Service, Department of the Interior 304
- Donahue, Don, Wildlife Permit Office, Fish and Wildlife Service, Department of the Interior 304
- Eisenbud, Robert, general counsel, Marine Mammal Commission 313
- Gehringer, Jack W., Deputy Director, National Marine Fisheries Service, Department of Commerce 286
- Hofman, Dr. Robert J., scientific program director, Marine Mammal Commission 313
- Jensen, William P., Marine Mammal and Endangered Species Division, National Marine Fisheries Service 286
- Jones, Clyde, Director, National Fish and Wildlife Laboratory, Division of Research, Fish and Wildlife Service, Department of the Interior 304
- Kaufmann, Col. Milton M., president, Monitor, Inc 330
- Milias, George W., Deputy Director, U.S. Fish and Wildlife Service, Department of the Interior 304
  - Prepared statement 301
- Stevens, Christine, secretary, Society for Animal Protection Legislation 328
  - Prepared statement 329
- Twiss, John R., Jr., executive director, Marine Mammal Commission 313
  - Prepared statement 313

Additional material supplied—

- Interior Department:
  - Questions answered by George W. Milias 307
  - Summary, U.S. Fish and Wildlife Service marine mammal program, fiscal year 1969–fiscal year 1983, table 309

Additional material supplied—Continued
  National Marine Fisheries Service: Page
    Estimated budgets 290
    Estimated expenditures for marine mammal program activities, table 298
    Estimated native subsistence take of marine mammals, 1973-76, table 300
    Marine Mammal Protection Act enforcement contracts, table 299
    Projected costs of observer program 296
    SK funds for implementation of the Marine Mammal Protection Act 300
    Status report on Alaska's waiver request 299
    Technical language 295
Communication submitted—
  Twiss, John R., Jr.:
    Letter dated March 16, 1977 enclosing additional material requested during hearing 328
    Letter dated April 15, 1977 enclosing information requested by subcommittee 318
    May 6, 1977 enclosing information appearing in letter of April 15, 1977 321

MARINE MAMMAL PROTECTION OVERSIGHT

THURSDAY, FEBRUARY 17, 1977

House of Representatives,
Subcommittee on Fisheries and Wildlife
Conservation and the Environment of the
Committee on Merchant Marine and Fisheries,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:12 a.m., in room 1334, Longworth House Office Building, Hon. Robert L. Leggett, chairman of the subcommittee presiding.

Mr. Leggett. The meeting of the Subcommittee on Fisheries and Wildlife Conservation and the Environment will please come to order.

I have got an extensive statement that I want to read at this point, to lay a foundation for these hearings, and we might as well begin.

The Subcommittee on Fisheries and Wildlife Conservation and the Environment is holding this oversight hearing this morning to assist it, its members, and its staff in staying fully informed on recent and continuing developments concerning the Marine Mammal Protection Act and the tuna-porpoise conflict.

To that end, we will be hearing from representatives of the Government agencies concerned, the tuna industry and the tuna fleet, environmentalists, and perhaps others not adequately categorized in the above groups.

This hearing continues the committee's exercise of its oversight responsibilities in this area which in the 94th Congress included oversight hearings in May, 1975, on the administration, enforcement and other implementation of the Marine Mammal Protection Act and oversight of the tuna-porpoise problem specifically last September, as well as related hearings.

It should go without saying that there will undoubtedly be more oversight hearings, and perhaps legislative hearings as well, on this subject before an adequate and equitable resolution of the problem is behind us.

At the risk of suboptimally using our time by covering terrain exceedingly familiar to most everyone here, I think it well for the record to briefly review a number of developments which bring us to this, the present juncture in our concerns. That which we sometimes delicately refer to as the tuna-porpoise problem results from commercial tuna purse seiners using the association of certain porpoise with yellowfin tuna as an aid in locating and netting the tuna.

Thousands of porpoise die each year in American and foreign-flag nets as a result of shock, injury, and suffocation when they are incidentally taken in the tuna purse seines. Congress addressed the problem in the 1972 Marine Mammal Protection Act and directed the Secretary of Commerce to conduct research to develop fishing gear and techniques which would permit porpoise to escape from the nets unharmed and, thus, reduce incidental take to the statutorily established goal of insignificant levels approaching a zero mortality and serious injury rate.

Under the act, the Secretary of Commerce must develop regulations, in consultation with the Marine Mammal Commission, to govern the incidental taking of marine mammals in the course of commercial fishing.

Following a 2-year grace period which expired October 21, 1974, commercial fishermen could legally take porpoise incidental to their fishing only under permits issued by the Secretary of Commerce and according to conditions established by him [her].

The Secretary of Commerce, on October 21, 1974, issued a general permit to the industry to allow incidental taking of porpoise for the remainder of the 1974 fishing season [and for the 1975 season, as well]. In December, 1975 he issued the American Tunaboat Association a general permit and individual fishermen certificates of inclusion governing incidental porpoise take for the 1976 fishing season. These regulations and actions of the Secretary were challenged in the court by the Committee for Humane Legislation, Inc., and the Fund for Animals, et al.

On May 11, 1976, Judge Charles R. Richey of the U.S. District Court for the District of Columbia issued an opinion and an order declaring the National Marine Fisheries Service regulations, general permit, and certificates of inclusion issued to tuna fishermen void as contrary to the provisions of the Marine Mammal Protection Act.

The two major failings in the regulations and the permit and certificates, the court held were: (1) the unrestricted nature of the general permit which did not specify a limit to the number or kind of porpoise which could be killed; and (2) the failure of the NMFS to base its regulations on determined and published reasonable estimates of the existing population levels of each species affected by the regulations, on calculated optimum sustainable populations of each of those species, and on the expected impact of the regulations on achievement of the optimum sustainable population level for each species.

Judge Richey's opinion concluded that the:

> Court feels that the only appropriate relief at this time is to stop completely the incidental killing of porpoise unless and until the Federal defendants are able to determine, as the Act plainly requires, that such killing is not to the disadvantage of the porpoise, and is otherwise consistent with the intent of the MMPA.

That decision marked the beginning of a series of often involved and confusing legal actions which continue to this day. Judge Richey's original order was to take effect on May 31, 1976, to provide time for its implementation. A request by NMFS and the tuna industry representatives to further delay the effective date of the order, pending appeal of the decision, was denied by the district court, but granted by the U.S. Court of Appeals for the District of Columbia, which court also agreed to reach a decision on the appeal directly on the merits. On August 6, 1976, the appeals court affirmed the decision of the district court, but stayed the effective date of the district court's order until January 1, 1977.

In the meantime, as part of NMFS's request to the court of appeals for a stay of the district court's order and in view of the district court's ruling that NMFS acted illegally in issuing a general permit without limitation, the National Marine Fisheries Service, on May 28, 1976, established a quota for the 1976 fishing season of 78,000 porpoise.

On June 11, 1976, NMFS published in the Federal Register its intention to continue the ongoing cooperative gear testing research on board commercial fishing vessels, to increase the number of scientific observers placed aboard tuna vessels, and the incidental take regulations were amended to establish the 78,000 take quota for porpoise.

On October 15, 1976, the NMFS served notice in the Federal Register that, based on available evidence and published methods of calculation, the 78,000 limit would be reached by October 19, 1976. Allowing for the 7-day notice requirements, the notice prohibited further setting on porpoise after October 22, 1976.

The prohibition against setting on porpoise after October 22 was challenged in the U.S. District Court for the Southern District of California by five tunaboat owners. On October 21, 1976, Judge William B. Enright of that district court issued a temporary restraining order enjoining NMFS from implementing the prohibition until November 1 pending consideration of the litigation on the merits.

On November 2, 1976, Judge Enright refused to issue a permit injunction, but he continued the TRO to allow time for appeal of his ruling. On November 10, 1976, the U.S. Court of Appeals for the Ninth Circuit upheld his refusal to issue a permanent injunction, thus sustaining the legality of the ban. U.S. Supreme Court Justice Rehnquist refused to intervene on November 12, 1976, and again on November 15, and the prohibition against setting on porpoise went into effect for the remainder of the 1976 season. The final estimated porpoise kill by U.S. tuna vessels for 1976 appears to be between 90,000 and 110,000 animals, well over the 78,000 quota, set in June and July by NMFS.

On October 14, 1976, NMFS published in the Federal Register proposed regulations to replace those voided by Judge Richey's order. Among other things, a total 1977 fishing season quota of 29,920 animals was proposed, broken down by stocks of species. This determination was arrived at by estimating the sustainable kill for each stock or species, and then reducing it by the estimated foreign kill.

Formal hearings before an administrative law judge on the proposed regulations were held in Washington, D.C., from November 15 to 19 and December 1 to 4, and in San Diego, Calif., on November 22 to 24 and 26, 1976. Administrative Law Judge Vanderheyden on January 19, 1977, recommended nearly a tripling of the NMFS's proposed quota, or 96,000 animals. The NMFC had suggested a quota of 50,158, and the Environmental Defense Fund, on behalf of several conservation groups, proposed a quota of 52,130.

The ALJ's recommendations are not binding on NMFS, and that Agency is expected to make a final determination on the 1977 quota at any time. I expected their decisions would be revealed today, but I have been advised they are not prepared to discuss the subject of a quota—or more accurately, I should say, I have been advised they are prepared not to discuss the subject.

Now we come a little closer to the present, and the litigation concerning the 1977 fishing season and the 1977 quota.

On December 6, 1976, two motions were filed with Judge Richey of the District Court for the District of Columbia. One by the Justice Department on behalf of NMFS requested the U.S. district court to extend until April 30, 1977, or until new regulations were adopted following consideration of the ALJ's recommendations—whichever come first—the stay of the court decision which bans fishing on porpoise (i.e., Judge Richey's May 1976 decision). That stay was effective only through January 1, 1977, and new regulations could not be ready by then.

The second motion filed that day was by the Committee for Humane Legislation/Fund for Animals seeking to have the U.S. District Court for the District of Columbia enjoin NMFS from issuing its proposed interim regulations related to tuna fishing on porpoise "or any similar regulations which may be issued without compliance with the provisions of the Marine Mammal Protection Act. . ."

Opposing briefs were filed that same day by the American Tunaboat Association and by the Environmental Defense Fund/Fund for Animals on the still unsettled question of whether NMFS should set a single quota to cover all porpoise mortality in fishing operations, or whether limits should be set on a species-by-species, population-by-population basis—the approach taken by NMFS in its proposed 1977 regulations.

On December 30, 1976, Judge Richey denied the Government's request for an extension of the stay on the order banning on porpoise fishing, thus meaning such fishing could not commence on January 1, nor until new legal regulations had been properly promulgated. The Government immediately moved to appeal that decision.

Over in California, in Judge Enright's Court, however, a lawsuit by the motor vessels *Theresa Ann*, et al. against the Secretary of Commerce led to granting in that Court on January 21, 1977, of a preliminary injunction enjoining NMFS from enforcing the provisions of the Marine Mammal Protection Act related to incidental taking of marine mammals in commercial fishing operations "until such time as a 1977 permit is either issued or rejected under the Act."

At the same time Judge Enright denied plaintiff's request for a summary judgment declaring the law to be unconstitutional. Thus, we have the most unusual, perplexing situation of two District Court Judges ruling in opposite ways on essentially the same question.

Judge Richey denies an extension of the stay and fishing on porpoise is banned until new regulations are promulgated; Judge Enright approves an extension of the stay, thus permitting fishing on porpoise for tuna until, at least, a 1977 permit is either issued or rejected.

Judge Enright's preliminary injunction was subject to numerous conditions, including an aggregate take limit of 10,000 porpoises, stock, and species limits reflecting the recommendations of the administrative law judge, and a requirement for NMFS observers on 10 percent of the boats within 2 weeks, and 25 percent within an additional 20 days.

On January 28, 1977, the U.S. District Court of Appeals for the District of Columbia Circuit agreed to receive litigants' briefs on January 31 and hear oral arguments on February 1 on the issue, and in light of Judge Enright's action, the court ordered litigants to apply to the U.S. District Court for the Southern District of California for a stay of that court's preliminary injunction and related orders of January 21. Pending a decision by the appeals court, the Government was restrained from issuing any permits to authorize incidental take of porpoise in association with commercial yellowfin tuna purse seining and was ordered to rescind any outstanding permits; the court also ordered the tunamen to avoid taking porpoise incidental to their fishing, pending further orders of that court.

On February 3, 1977, after hearing oral arguments, the appeals court granted the motion of the Committee for Humane Legislation for injunctive relief and set forth an order which emphatically states —the counsel has the exact order here, which I will include in the record at this point, but I am not going to read, but it did, among other things, restrain the Secretary of Commerce from issuing any permits, among other things, restrained the Tunaboat Association and all of its agents, et cetera, from taking incidental to yellowfin tuna, in a system commonly known as purse seine.

It directed the Secretary of Commerce to formulate a plan to submit to the courts within 10 days on the steps to discharge their duties under the court order; it ordered the Secretary of Commerce to investigate and report to the court various violation; it ordered the Marine Mammal Protection Act, it ordered the Secretary, under the act, to make findings as to whether or not they had been in violation of the act; it ordered the FBI to investigate; it ordered that the Secretary file a record of any violations with the court before granting any additional permits, and it ordered the American Tunaboat Association to file with the clerk of the court by March 7, an affidavit executed on behalf of each of its members, under what date and what circumstances the member has engaged in taking of porpoise and yellowfin; it further directed that the order be communicated to all of its members.

[The material was placed in the record files of the committee.]

Mr. LEGGETT. This congressional hearing today aims to determine the latest developments in this continuing saga. It may provide good stuff for an ultimate law review article, but it is most certainly not funny to the Government, nor to the industry whose vessels hardly know from one day to the next whether or not they can fish, whether or not they must have observers on board, and even which court has authority or jurisdiction.

It is my hope that the developments in improved fishing techniques which have been researched and demonstrated by the cruises of the

Bold Contender and the *Elizabeth C.J.*, will be put in perspective for us today, which may offer some light at the end of a very black tunnel.

It does appear that a combination of refined Medina panels in the nets using the smaller mesh aprons, the presence of crew members in the nets to assist porpoise in escaping from the nets, and in guiding the backdown and the net hauling can markedly reduce porpoise mortality.

Figures demonstrating the wide disparity in records of various vessels and crews with respect to mortality per set definitely indicates an area of meaningful payoff for both porpoises and the good crews.

I think we do have some options here, including possible legislative ones. Although there is no legislation before this committee today.

I believe, with Professor Norris of the University of California at Santa Cruz, that "regulations should be revamped to reward the best boats for their porpoise saving prowess in the currency they know best—the chance to fish."

I am personally no more committed to abandoning either this most important American fishery, nor the porpoises whose conservation and welfare are in our charge. Again, like Dr. Norris, I think—

> There is hope for both the porpoise and the U.S. tuna fishery. But, while better ways of catching tuna and saving porpoises are being evolved into policy or science, let's not trap ourselves into a corner nobody wants to occupy—the one where the porpoises and the fishery are both lost.

So that is an extensive statement, but unfortunately it is one that we had to make to bring us reasonably current and up to date today, and we hope to have a balanced hearing today, and if anybody, at any time, does not think that our hearing is balanced, please raise your hand, and you will be recognized for a point of order.

We thought it fair to commence the hearings today with Government witnesses, and perhaps it might be well, before we start the witnesses, that we hear from the chairman of the full committee.

I call on Chairman Murphy.

The CHAIRMAN. Thank you, Congressman Leggett, and I would like to express my gratitude for your moving so quickly at this time into the conflict between the American tuna fishing industry and conservationist groups over the killing of dolphins which is cast in the classic pattern of the last 5 years.

On the one hand, conservationists are seeking to curb or bring to a halt an economic activity that is threatening an important element of the environment—in this case, a marine mammalian species.

And on the other, the industry points out that it is performing an essential function—providing employment and contributing to the stability and growth of the American economy—and should not be sacrificed for environmental considerations.

As we all know, the tuna fishing industry does not kill dolphins for themselves. Yellowfin tuna cluster near dolphins, and the dolphins are killed incidental to the catching of tuna. Conservationist groups demand that tuna fishermen immediately stop killing dolphins even if it means drastic curtailment or complete cessation of fishing.

The tuna fishing industry, which is the single largest segment of the American commercial fishing industry, as a whole, argues that immediate compliance with this demand will mean destruction of the domestic industry. The industry adds that if it must shut down, many tens of thousands of persons will lose their jobs. Some are directly employed by the fishing industry: others are employed in processing and distributing the tuna caught by the industry, and still others are employed in service industries.

And the American consuming public will also suffer.

The response of conservationist groups has been "so be it"—that the dolphin population is too important to be sacrificed for the sake of tuna fishing. And so battle lines have been drawn, and we are asked to choose between the protection of the dolphin and protection of the tuna fishing industry.

But must we choose between one or the other?

My present view is that the battle lines are overdrawn—that there may be a way of resolving the conflict without having to choose between destruction of the dolphin population and destruction of the tuna fishing industry. I do not have a ready prescription. That will depend to a considerable extent on the factual picture that I hope this hearing will portray.

We read from time to time, for example, that the industry is developing new gear and new techniques so that it may catch yellowfin tuna without incidental killing of the dolphin. How effective are the gear and techniques? Are they still experimental, or are they fully developed? And are they economically feasible?

What of the threat to the dolphin population? What has been the rate of incidental killing since enactment of the Marine Mammal Protection Act of 1972?

I will not review the legal situation. Congressman Leggett has laid that out clearly.

The conflict between the Federal courts in the District of Columbia and California can be resolved through the legal process. But—if it is feasible—the quickest solution would be an administrative one—through the issuance of new and valid regulations and permits by the Secretary of Commerce. It is now incumbent upon the Secretary to act as speedily as possible or to tell us why she cannot act.

Hopefully, in the process, the Secretary will provide answers to many of the questions I have raised. These answers are a necessary prelude to meaningful congressional review.

In closing, let me affirm that I endorse fully the basic intent of the Marine Mammal Protection Act—that the Nation's primary objective should be to protect marine mammals such as dolphins because of their importance to the marine ecosystems in which they function, and because of their importance to mankind generally.

But I think we all recognize that we also have an obligation to our domestic tuna fishing industry—to provide a climate in which it can function, flourish, and expand. And provided that we do so consistent with the spirit and intent of the Marine Mammal Protection Act, we should search for ways of meeting this obligation.

The answer may lie in modern technology, or it may lie in a regulatory regime. Or it may lie in an amendment of the act itself—not amendment of the primary objective and the general spirit of the act, but of its working definitions and procedures. Or it may lie in some combination of all three.

We look to this hearing today to provide perhaps the answer to this dilemma.

Mr. LEGGETT. Thank you, Chairman Murphy.

I might state additionally, that it is the opinion of the Chair that the Marine Mammal Protection Act is still an extremely viable act, and that the tuna industry is also an important economic entity, in the United States, and I do not believe that these activities are exclusive.

We are all disturbed that after 5 years of the Marine Mammal Protection Act we are still taking 100,000 porpoise, which are not utilized for food, for any particular purpose, but it is destroyed, and we are going to be searching for ways to effectively make the rubber meet the road, and attempt, in some realistic fashion, to reach the objectives that have been set forth in the Marine Mammal Act some years ago.

I am convinced, even after running this subcommittee for the past few years, that these objectives are reasonably achieveable.

So without further editorial from me, I think that at this point it would be well to hear from Government witnesses.

We are operating in a framework where the three branches of Government are somewhat interrelated, as has been indicated, and there are certain inhibitions as to what can be stated, and we all recognize that, but within the framework of what we can say and what we can do at this point, we would hope that we would have the maximum degree of candor and expression from the witnesses.

We have the Deputy Administrator of the National Oceanic and Atmospheric Administration, Mr. Pollock, and the Director of the National Marine Fisheries Service, Mr. Schoning.

You have all of your lawyers and staff and professional consultants with you. You can have as many as you want approach the table, and you can proceed to present your statement.

Your statement will appear in the record as though fully given. You can either deliver it, or emphasize portions, as you choose.

Very nice to have you here, Mr. Pollock.

STATEMENT OF HOWARD POLLOCK, DEPUTY ADMINISTRATOR, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, ACCOMPANIED BY ROBERT W. SCHONING, DIRECTOR, NATIONAL MARINE FISHERIES; DAVID H. WALLACE, ASSOCIATE ADMINISTRATOR FOR MARINE RESOURCES; WINFRED H. MEIHBOHM, ASSOCIATE DIRECTOR, NATIONAL MARINE FISHERIES SERVICE; WILLIAM C. BREWER, JR., GENERAL COUNSEL, NOAA; DR. WILLIAM FOX, CHIEF, OCEANOGRAPHIC FISHERIES RESOURCE DIVISION, SOUTHWEST FISHERIES CENTER, LA JOLLA, CALIF.

Mr. POLLOCK. Thank you very much, Mr. Chairman.

I have with me, on my right, Robert W. Schoning, who is the Director of the National Marine Fisheries Service, and on my left, William C. Brewer, Jr., who is the General Counsel for NOAA.

I also have, right behind me, Winfred H. Meibohm, who is the Associate Director for the National Marine Fisheries Service; and

Dr. William Fox, who is the Chief of the Oceanographic Fisheries Resource Division, Southwest Fisheries Center at La Jolla, Calif.

Mr. Chairman, Mr. Murphy, members of the subcommittee, we are pleased to be here today to discuss with you the issues surrounding the implementation of the Marine Mammal Protection Act with specific reference to problems involving the tuna-porpoise situation.

As you know, the Marine Mammal Protection Act was enacted in 1972. With regard to the incidental take of marine mammals associated with commercial fishing activities, the act provided a 2-year "grace period" for the fishing industry. After the expiration of the 2 years, any incidental taking of marine mammals had to be pursuant to permits which were to be issued by the Secretary of Commerce pursuant to regulations after a thorough analysis of the marine mammal stocks and the possible impact on those stocks any taking might have. We issued regulations on September 5, 1974, which we felt would adequately address the requirements of the act and recognize the complex environmental issues involved.

As you are aware, there has been considerable controversy over the past year involving the promulgation of our regulations and our actions related to the act. Much of this has resulted in litigation. On May 11, 1976, Judge Charles R. Richey of the U.S. District Court for the District of Columbia in *Committee for Humane Legislation, Inc.* v. *Richardson*, (414 F. Supp. 297 (D.D.C. 1976)) invalidated our regulations and the general permit which authorized the taking of marine mammals incidental to yellowfin tuna purse seining. That order was stayed, as you indicated, by the U.S. Court of Appeals for the District of Columbia Circuit until January 1, 1977 (540 F. 2d 1141 (D.C. Cir. 1976)) to avoid an immediate disastrous impact on the fishermen who were operating under the general permit and to allow ongoing gear studies to continue throughout the season. In response to the court's decision, an intensive scientific effort was carried out by our scientists to make certain determinations required by the court as to the status of the stocks of the porpoises involved in this fishery. This effort resulted in new proposed regulations. Public hearings before an administrative law judge were held to review the proposed regulations and the judge's recommended decision was issued on January 17, 1977. A review of his recommendations has been completed, and we will promulgate revised regulations, on behalf of the Secretary of Commerce, within a few days.

The situation has been complicated by additional court actions. On January 21, 1977, Judge William Enright of the U.S. District Court of the Southern District of California in *American Tunaboat Association* v. *Richardson*, (Civil No. 76–971–E) issued a preliminary injunction staying the enforcement of the Act insofar as the incidental taking of porpoise is concerned, subject to certain conditions. That decision allowed the tuna industry to go fishing on porpoise after January 25. Subsequently, the U.S. Court of Appeals for the District of Columbia Circuit in Committee for Humane Legislation issued two separate orders on January 28 and February 3 which, among other things, required us to submit an enforcement plan; required us to move the District Court in California to dissolve its order; restrained us from issuing a permit that would allow the incidental taking of porpoise until the Secretary has complied fully with the act and subsequently issued new regulations; prohibited any incidental taking of porpoises until a valid permit is issued; and prohibited representatives of the tuna industry from instituting any new litigation seeking to allow the taking of porpoise.

This past week we moved the California District Court to dissolve its order, but our motion was denied. We further moved to stay enforcement of the order pending appeal. This also was denied. We have appealed both rulings to the U.S. Court of Appeals for the Ninth Circuit. Earlier this week we submitted to the Court of Appeals for the District of Columbia Circuit our plan indicating how we intend to enforce the act with respect to the incidental take of porpoise.

As I mentioned earlier, we expect to have the revised regulations promulgated this month—in the next few days, hopefully. These regulations will contain a quota on the number of porpoises which can be taken during the 1977 season. Mr. Chairman, we are aware of the urgency to move quickly. Within the statutory requirements for public review and comment we hope to issue a general permit and certificates of inclusion under that permit in April. However, that timetable is not totally predictable because the Court of Appeals for the District of Columbia Circuit has indicated that it will review the background data and evidence developed with regard to any application for a permit. Pending the issuance of the new permit, no U.S. tuna boats are allowed to take any porpoise incidental to yellowfin tuna fishing, and to the best of our knowledge, none are.

Mr. Chairman, despite the present conflict in the courts, we hope that no one will overlook the basic fact that, since 1972, the Government and the tuna industry have made considerable progress in reducing the incidental take of porpoise by U.S. fishermen. There has been a substantial amount of money and effort expended on research by all the parties involved. New fishing methods and technologies have been developed. In 1972 the take was over 300,000 animals. In 1976, based on the data we have been able to develop so far, we estimate that the incidental kill was 100,000 animals. While it is true that last year's kill represents a reduction from earlier years, obviously further improvement is needed. We believe that the future will see a continued substantial reduction in death and injury to porpoises. This is not just unfounded optimism but a reasonable expectation based on our new regulations and gear and technical developments. We believe the regulations for the 1977 season will protect all species and assure that any stock below optimum sustainable population will increase in abundance. As we have said repeatedly over the last several years, there is no easy answer to this problem, but there is reason for expecting steady progress toward a solution.

We find ourselves today in a most difficult situation, Mr. Chairman. We endorse the desire of those individuals who believe that porpoises should be protected. We also believe that the interests of both the people of the United States and the porpoises are best served if the U.S. tuna fishing industry continues to operate under the U.S. flag. We believe our revised regulations will meet both objectives.

While we are trying to the best of our ability to live up to the stringent requirements of the act and the directives of the Court of Appeals for the District of Columbia Circuit, we cannot be sure that we will be able to satisfy all the divergent interests with the revised regulations. The administration is determined to move as quickly as possible and is watching developments closely. If, due to future problems, we find that we are unable to reach an accord, the existence of both the tuna industry as well as the porpoises will be in jeopardy. It may come to a situation where we will be forced to consider legislation, and I think you mentioned that yourself, Mr. Chairman, designed to minimize some of the obvious conflicts.

Mr. Chairman, I have tried in my statement to give a brief history of the problem and to put the recent developments into perspective. Obviously, however, I did not go into detail on all our activities, nor did I try to anticipate every inquiry. I recognize that this issue is very complex, and you undoubtedly have many questions. We will try to answer whatever questions you may have.

Thank you.

Mr. LEGGETT. Thank you.

Does Mr. Schoning have a separate statement?

Mr. SCHONING. I do not.

Mr. LEGGETT. All right.

And you did indicate, that to your knowledge, none of the boats are fishing, setting on porpoises at the present time?

Mr. POLLOCK. On porpoise with purse seine sets, that is correct.

Mr. LEGGETT. Of your knowledge, do you know what they are doing?

Mr. POLLOCK. Well, I would have to defer to my fisheries people, but I would presume that the fishermen are out taking other species of fish, which is quite within the law.

Mr. LEGGETT. Maybe your fisheries people could respond to that.

How many boats are out, where are they fishing, and what are they taking?

Mr. POLLOCK. I think I would like to have Dr. William Fox from the La Jolla Laboratory respond.

Dr. FOX. My information indicates that most of the fleet is out fishing. They have been fishing in widely dispersed areas off Baja California, but mostly concentrating in the vicinity off the northwest coast of South America.

From the information that we presently have indications are that the catch of yellowfin tuna is down by about 10 percent over the first 5 weeks from previous years. The catch of skipjack is down appreciably more than that, on the order of a third.

Mr. LEGGETT. Do you get that information by landings, or by telecommunications contact?

Dr. FOX. We get this information from the Inter-American Tropical Tuna Commission, that maintains a system of radio reporting by vessels.

Mr. LEGGETT. Of your knowledge, are the—does the Inter-American Tropical Tuna Commission report only American catch, or all ships' catch?

Dr. Fox. I should have qualified it. I believe the catch figure reflects the international fleet, not just the U.S. fleet. But the U.S. fleet is a major share of the international fleet, so it should be roughly close to what the total is in terms of percentages.

Mr. Leggett. As I recall, the American fleet is something like 60 percent of the——

Dr. Fox. No, it is closer to 70 percent of the capacity tonnage.

Mr. Leggett. So that the yellowfin is down by about 10 percent, you do not know which ships have caught what percentages of what fish, right?

Dr. Fox. That is correct.

Mr. Leggett. And now, as I understand the law, and the order that is in effect, we have 10 percent of the observers on board, and that was programed to go to 20 percent.

How many observers are on board ships of the U.S. at the present time?

Dr. Fox. At the present time there are five observers at sea. They are aboard three different ships; three are on one boat, and one each on the two additional vessels.

We had, at one time, approximately 13 on board vessels, but these were subsequently let off as a result of the court actions.

Mr. Leggett. So the provision of Judge Enright's order, which allows fishing, purse seine fishing, on condition that certain observer requirements are met, the industry is not attempting to comply with that at the present time?

Dr. Fox. Well, they did comply. His order said that 10 percent of the fleet should be covered within 2 weeks.

As I said, we got 13 out, which was approximately 10 percent within the 2 weeks, but then that number was decreased in response to the District of Columbia Circuit Court of Appeals ruling.

So, as of right now they are not in compliance with Judge Enright's order.

Mr. Leggett. They are in compliance with Judge Enright's order, in that they are not fishing on the yellowfin, and on the other end, they do not have observers.

Dr. Fox. They do not have sufficient observers at the present time to comply with Judge Enright's order.

Mr. Leggett. All right.

Now, as I understand the regulations currently thought to be promulgated, the Deputy Administrator has indicated that that order will not—the new regulations will not become operative until some time in April, or maybe later.

The Chairman. Will the gentleman yield?

Mr. Leggett. Yes.

The Chairman. Where are these new regulations?

Mr. Pollock. They are in our Department under review, Mr. Chairman. We would hope in the next 2 or 3 days to have the necessary clearances within our Department. At that time we will have to publish them and allow 30 days for the public to respond. That is the delay.

The Chairman. I do not know why we did not have them up here so that this hearing could have the benefit of what those are, and this process could move that much faster.

We talk about them, and then we do not know what we are talking about.

Mr. Pollock. I think it is unfortunate that the hearing was scheduled today, instead of 2 or 3 days from now. But we did our best. The regulations are a very serious business, and have to be done right.

Mr. Leggett. Can I ask Dr. Fox if you can project what will be fished by the industry overall, over the next 2 months?

Dr. Fox. No. Fishing conditions vary so greatly that it is impossible to give any kind of accurate projection of what the catch or the species composition might be.

Mr. Leggett. Well, you testified, I believe a year ago, that were the fishing stopped, it would be a concentration on skipjack, which would cause some incidental catch of nonmature species.

You indicate in your testimony today that the fishing on skipjack is down from a year ago, and I guess you are just reading the statistics that come in.

Do you have any analysis, or biological analysis of the reason for our current condition?

Dr. Fox. We expect that—regardless of the amount of fishing effort put on skipjack, the low skipjack catch this year, is due to the low availability of the skipjack resource. What we did say is, if fishing were prohibited on porpoise then the fishery would tend to move inshore, fishing on skipjack and yellowfin tuna not associated with porpoises, and if indeed that is what the fleet did, then these are the catches they have achieved to date.

Mr. Leggett. Now, you have the statistics from the Inter-American Tropical Tuna Commission as to the tons of fish taken. What were the numbers of porpoise taken?

Dr. Fox. Well, we have not really been able to make any estimate of the number of porpoises taken. However, the observers that went out observed approximately 20 porpoises being killed during the period of time that they were out, catching approximately 120 tons of yellowfin tuna.

Mr. Leggett. That is not much of a microcosm to project.

Dr. Fox. No; it is a very small sample.

Mr. Leggett. And the Inter-American Tropical Tuna Commission, so we understand it, do I understand they do not collect information the number of porpoise taken by their members?

Dr. Fox. At this time they do not.

Mr. Leggett. All right.

Let me see, Mr. Murphy, do you have questions at this point?

Mr. Pollock. Mr. Chairman, may I intervene for a moment to respond to Congressman Murphy's comment?

I just want to point out that the comment period by the public on the Administrative Law Judge's recommendations ended on January 21, and since then the Director has reviewed 3,500 pages of records, and 90 exhibits.

As I indicated, we are very hopeful that we will have the regulations cleared in the Department in the next 2 or 3 days.

The Chairman. The staff of this committee was notified that you would have these 2 or 3 days before this hearing. Because this hearing is supposed to, as I said in my opening statement, as the chairman of the subcommittee said, is supposed to lay the base for resolving this problem.

I do not think it is fair to the environmentalists, or to the tuna fishing industry, to be dangled further, and not reach the basis for a resolution of this problem.

What action are you going to take against foreign vessels that kill dolphins?

Mr. LEGGETT. If that is within his——

Mr. POLLOCK. I would like to call on Bill Brewer, our General Counsel. He can talk about enforcement, which would cover this.

Mr. BREWER. We were required by the court of appeals here in the District of Columbia to file a plan of enforcement for U.S. vessels both with respect to the period prior to the time our regulations are in effect, and after that period.

Upon the assumption that your question relates to the present period before our regulations are in effect, the gist of our plan is that we will use aerial surveillance for enforcement. We feel that we are able to do it, because the fleet at this time is fishing fairly near shore. Since we do not have any substantial number of observers on board, and indeed have no legal powers to require them on board at this time, aerial surveillance seems to be the best method available. We think it will be effective.

The CHAIRMAN. Why have you not had the aerial surveillance before, so that you can monitor just what the foreign fleet is doing?

Mr. BREWER. For one thing, the aerial surveillance is not practical at many times during the year when the vessels are far offshore. The second response is that we have had, where they are fishing under permit, a fairly substantial number of observers on board the U.S. vessels.

Mr. LEGGETT. If the chairman would yield.

Does the court order, as you interpret it, relate only to your enforcement with respect to American fishermen, or does it also relate to enforcement with respect to foreign fishermen, which would include the embargo provisions, which we have included in the act, which would preclude the importation in the United States of tuna products caught in violation of the standards applicable to American fishermen?

Mr. BREWER. We interpreted it, Mr. Chairman, as meaning enforcement of the provisions of the act with respect to domestic fishermen because that, of course, was the issue in the litigation.

So far as control over foreign fishermen is concerned, basically the importation requirements that you refer to are the only methods of enforcement that we have, and we have addressed those separately in the regulations.

Mr. LEGGETT. Section 1376 of title 18 provided to me by counsel states, any vessel, or other convenience subject to the jurisdiction of the United States employed in any manner in the unlawful taking of marine mammals shall have its entire cargo subject to forfeiture or seizure, condemnation of cargo, violation of customs laws, disposition of such cargo—and in addition, litigation of forfeiture shall apply with respect to cargo of any vessel, et cetera—of course, there are also special provisions on embargo of products that are caught by the violators.

Mr. ROGERS. Will the chairman yield?

The CHAIRMAN. I have the floor.

Mr. ROGERS. I thought you were the chairman.

The CHAIRMAN. The subcommittee is controlling the time.

I will be happy to yield.

Mr. ROGERS. Thank you.

I am just delighted to see you, Mr. Pollock.

I wonder, has there been any shift of the American fishing fleet to foreign flag?

Mr. BREWER. At the present time, there has not been such a shift, but we do have applications in hand for the transfer of six vessels.

To be more precise, the Maritime Administration has these applications under their statutory authority, and in following customary practice, has asked for our views on it. But no action has been taken as yet.

Mr. POLLOCK. We have not given those views to MarAd.

Mr. ROGERS. What would be your attitude on that?

Mr. POLLOCK. I am not sure that it would be wise to preempt the judgment of the Department at this point, but we are certainly cognizant of the fact that if any of our American tuna fleet did go under a foreign flag, there would be serious problems with protecting the porpoise that we are trying to protect under the act.

Mr. ROGERS. Do you have, as the law permits, a denial of the right of shifting?

Mr. POLLOCK: Yes, sir, I understand it does.

Mr. ROGERS. So it could be prevented if the Government so desired?

Mr. POLLOCK. Yes, sir.

Mr. Brewer may want to comment further.

Mr. BREWER. Yes, sir, that is a correct statement. However, the law does not set up any standards under which this discretion is to be exercised.

In the past, it has been exercised on grounds of national defense.

Mr. ROGERS. Thank you.

Thank you, Mr. Chairman.

Mr. LEGGETT. Mr. Murphy had to leave for a few moments.

Mr. Oberstar?

Mr. OBERSTAR. No comments at this time.

Mr. LEGGETT. Mr. Studds?

Mr. STUDDS. Thank you, Mr. Chairman.

May I first ask an elementary question on behalf of a sixth grade student?

The chairman of the subcommittee is concerned about porpoises, and the chairman of the full committee is concerned about dolphins. Is there a difference?

Mr. POLLOCK. I will have to refer to my experts, but it is my understanding they are both the same animals. The National Marine Fisheries Service does use different words, but I think biologically they are the same.

Dr. FOX. Dolphins and porpoises are cetaceans occurring in different parts of the world. Although the terms are used interchangeably, porpoises are small cetaceans which do not have long beaks, and dolphins are small cetaceans with the beak. That is a simple explanation between a dolphin and a porpoise.

Mr. STUDDS. For the purposes of this hearing and this law, are we assuming that they are the same, and interchangeable?

Mr. POLLOCK. Yes; we are assuming that they are the same.

Mr. STUDDS. Let me ask you. You refer on page 6 of your statement, Mr. Pollock, to any stock below optimum sustainable population.

Do we have any stocks of porpoises at this point that we have reason to believe have been fished below that optimum sustainable yield?

Mr. POLLOCK. Mr. Studds and Mr. Chairman, I do not like to sidestep the issue, but this issue is in litigation. It is part of the decisionmaking process and is a matter of interpretation. I think I cannot answer the question to your satisfaction at this point.

Mr. STUDDS. I certainly agree with your last statement.

Might you be able to——

Mr. POLLOCK. I apologize.

Mr. STUDDS. When might we anticipate an answer to that question?

Mr. POLLOCK. I would hope that within the next few days, when we issue our 1977 regulations, we will be able to answer that question.

Mr. STUDDS. In this because there are scientific disagreements, or because of the litigation?

Mr. POLLOCK. I think there is a scientific disagreement.

Mr. LEGGETT. If the gentleman will yield?

Mr. STUDDS. Yes.

Mr. LEGGETT. I must caution the committee that at times past when we have got too confused between the legislative and the executive branch in promulgating regulations, and where it appears that the legislative branch has exercised any degree of motivation or coercion with respect to the exercise by the executive branch of their discretion in the promulgation, that those regulations have been invalidated, and we have got problems enough right now with our time periods, and so I would caution the members not to press the witnesses beyond where they would like to be pressed, though, and very frankly, this is a very difficult area, where we have regulations sought to be promulgated, being interpreted by administrative law judges, and making some findings which appear to be somewhat at variance with the Administrator's original interpretation of the regulation, and pressing by the committee at that point will disturb this delicate process before it comes into fruition.

I hope that explains it.

Mr. STUDDS. I thank the chairman for his clarification.

I take it that the essence of your nonresponse is that there is some doubt at this time as to whether or not any species of porpoise have been fished beyond their optimum sustainable yield. That that is a matter of some question.

Mr. POLLOCK. That is a matter of some question. There is some question of interpretation as to whether marine mammals below the optimum yield are depleted.

Mr. LEGGETT. I would like to correct the record, if I could also intervene.

Off Georges Banks we talked about yields, when we talk about the porpoise, we are talking about populations. We are talking about optimum sustainable population, and we want to get down to zero, and we are talking about optimum sustainable yields of populations.

Mr. STUDDS. Under the 200-Mile Act, with the zone becoming effective on March 1, as I understand it there can be no taking of marine mammals in our fisheries zone without a permit, is that correct?

Mr. POLLOCK. That is correct.

Mr. STUDDS. Have any foreign nations applied for permits to take marine mammals?

Mr. POLLOCK. I must say that the tuna fishery is excluded from the provisions of the 1976 act.

Mr. STUDDS. I understand that, but have there been any foreign applications for permits to take marine mammals within our 200-mile zone?

Mr. POLLOCK. The answer is yes; there have been several including some involving Japan.

Mr. STUDDS. What do they want to do?

Mr. POLLOCK. I will yield to Mr. Schoning.

Mr. SCHONING. Mr. Studds, we will be happy to provide that information for the record.

[The following was received:]

FOREIGN INCIDENTAL TAKING PERMIT APPLICATIONS UNDER THE MARINE MAMMAL PROTECTION ACT

Country	Association	Category	Gear	Number of vessels	Number of marine mammals expected to be killed/injured	Fisheries involved
Korea	North Pacific Fisheries Development Association.	Stationary gear No. 4; other gear No. 5.	Traps, pots, longline	10, 7	0 (harassment involved)	Bering Sea, Gulf of Alaska—sable fish.
Do	do	Towed or dragged gear No. 1	Trawling	56	Sea lions—280; seals—280; others 168.	Bering Sea, Gulf of Alaska, Atlantic Ocean, pollock, squid, caplin, cod, other bottom fish.
Japan	National Federation of Medium Trawlers.	Towed and dragged gear No. 1	do	154	Sea lions—800; others—6	North Pacific—pollock rockfish, Pacific cod, black cod, flounder, squid, other groundfish.
Do	Hakuyo Longline Gillnet Association.	Other gear No. 5	Longline, gillnet	22	0 (harassment involved)	North Pacific—black cod, Pacific cod, rockfish, flounder, herring.
Do	Japan Deep Sea Trawler's Association.	Towed or dragged gear No. 1	Trawling	[1] 186	Pacific: Sea lions—1500; other—10. Atlantic: Sea lions—1; porpoise—1; seals—1; others—2.	North Pacific, North Atlantic Oceans—pollock, rockfish, Pacific cod, black cod, flounder, squid, other ground fish, butterfish, Argentine.

---

[1] Approximate.

Mr. Studds. Is there a preliminary management plan indicating whether that permission will be granted?

Mr. Schoning. There is a preliminary management plan relating to fisheries. What we have to do after we formally receive applications for permits is to then go through the process required by the Marine Mammal Act, and see whether a permit can be granted.

Just like the normal procedure we get with the permits.

Mr. Studds. We will get the Japanese GIFA, and the public review period for the permits from Japan?

Mr. Schoning. Yes; the public review period for the applications for mammal taking will come after the GIFA.

Mr. Studds. What happens to porpoises that are killed in incidental taking?

Mr. Schoning. They are put out of the nets.

Mr. Studds. Is that the Government's way of saying that they are thrown back overboard?

Mr. Schoning. Yes. They are returned to the sea, either while still in the nets, or thrown overboard if the net is on board.

Mr. Leggett. They are recycled in the ecosystem?

Mr. Studds. One last question.

On page 5, Mr. Pollock, you say, "no U.S. tuna boats are allowed to take any porpoise incidental to yellowfin tuna fishing, and to the best of our knowledge, none are."

That is correct at this point?

Mr. Pollock. That is correct.

Mr. Studds. Thank you, Mr. Chairman.

Mr. Leggett. Mr. Hughes?

Mr. Hughes. I have no questions.

Mr. Leggett. Mr. Bonior?

Mr. Bonior. No questions.

Mr. Leggett. I might state this, that this is a subject matter on which we could hold hearings for a week. It is not the intention of the Chair to do that.

I intend to pursue this matter today as late as we may go. I would hope that as many of the witnesses who do testify, would stay, such that we might have a maximum available resource continually available to answer questions that may arise.

Mr. Pollock. Mr. Chairman, I wonder if I could have my experts stay? I have a commitment.

Mr. Leggett. Nobody has to stay. Anybody that cannot stay, I appreciate it. Mr. Mannina.

Mr. Mannina. Thank you Mr. Chairman. The administrative law judge made several recommendations for amendment of the 1977 regulations.

For each recommendation that you do not adopt, could you submit for the record an explanation of why you elected to reject that recommendation?

Mr. Pollock. The answer to that is "Yes."

Mr. Mannina. If you do accept the administrative law judge's recommendation of 50 percent lower bound OSP, could you supply for the record why you elected to go with the lower bound?

Also in your statement on page 4, you indicated that you submitted to the court of appeals your plan for enforcement. Would you submit that for the record?

Mr. POLLOCK. I have it here, and I will submit this for the record at this time.

[The following was received for the record:]

PLAN SUBMITTED BY THE DEPARTMENT OF COMMERCE FOR THE ENFORCEMENT OF THE MARINE MAMMAL PROTECTION ACT IN COMPLIANCE WITH THE ORDER OF THE U.S. COURT OF APPEALS DATED FEBRUARY 3, 1977

In an Order dated February 3, 1977, the U.S. Court of Appeals for the District of Columbia, directed the Secretary of Commerce to submit, within 10 days of that Order, a plan indicating how she proposes to discharge her duty in enforcing provisions of section 107(a) of the Marine Mammal Protection Act of 1972. The following plan is presented in compliance with that Order.

The plan contains two operational phases: *Phase A* covering the period during which setting on porpoise by U.S. tuna purse seiners is prohibited, and *Phase B* covering the period after the 1977 regulations are effective and when provisions of a general permit are expected to govern the setting on specific porpoise populations while fishing for yellowfin tuna.

It is the intention of the Secretary to ensure that the Marine Mammal Protection Act is complied with and enforced fully and fairly.

PHASE A

Phase A will cover the period through mid-April, 1977, by which time the Department's rulemaking, conducted pursuant to the Act, will have been completed and permits, if appropriate, will have been issued.

The Department's enforcement plan for this interim period prior to mid-April shall consist of the following components:

1. Aerial surveillance
2. Enforcement policy of maximum penalties
3. Required daily reports of vessel positions by tuna purse seiners
4. Restrictions on use of operational speedboats in connection with tuna purse seiners
5. Interim authority to order vessels in violation to return to port
6. Inspection of ship logs and catches

The primary means to deter and detect violations, if any, for the illegal setting on porpoise will be aerial surveillance of the U.S. tuna purse seine fleet. As an additional deterrent, the Department is adopting an enforcement policy of maximum penalties for all violations.

Aerial surveillance will be maintained over the U.S. tuna purse seine fleet fishing yellowfin tuna which during this part of the season is operating between Baja California and northern Peru and seaward within several hundred miles from shore (see attached map). The surveillance will be aided by seasonally good weather expected over the area. Arrangements are being made to stage surveillance aircraft having an effective range of 2,000 miles from strategic locations in Latin America. We plan to provide at least 60 hours of aircraft time per week to ensure sufficient on-site monitoring of the U.S. tuna purse seine fleet activities. The use of some of these areas will require appropriate foreign clearances; and such clearances are being requested from the Department of State on an expedited basis. We have been informally assured of the full cooperation of the Department of State.

Upon receipt of clearances, the Department will provide aircraft surveillance capability for at least 60 hours a week during Phase A. National Oceanic and Atmospheric Administration (NOAA) aircraft will serve as the primary surveillance craft with private charter aircraft in reserve. The U.S. Coast Guard has informally indicated that it will provide limited assistance up to 100 hours of flight time. In addition, the Department will use National Marine Fisheries Service enforcement agents to accompany all flights to properly document fishing activities and prepare evidence on any observed violations.

To ensure and enhance the effectiveness of the Air surveillance, certain supportive actions are essential.

The first is daily radio reporting of vessel positions by each tuna purse seiner. These reports, obtained through the cooperation of the U.S. Coast Guard, are essential to maintain close contact with the movement of the fleet and to reduce unnecessary air search time. Secondly, since speedboats are deployed primarily to herd porpoise schools, it will be essential to limit the number of operational speedboats allowed on the deck of each vessel or in the water. This restriction can be easily monitored from the aircraft. Third, Federal enforcement agents must have the authority to direct vessels observed in volation of the order to return to port. The final requirement is authority to conduct dockside inspection of vessel logs and catches to determine whether porpoise sets are made during the trip.

These supportive actions can be implemented by a court order that: (1) requires U.S. tuna purse seiners to report daily positions to the U.S. Coast Guard via radio at a specified time established by the NMFS; (2) requires U.S. tuna purse seine vessels to have on deck only one operational speedboat with the outboard motor attached and stow all remaining outboard motors below decks; (3) grants NMFS enforcement agents the authority to direct vessels in violation of the Order to return to port immediately; and (4) grants NMFS enforcement agents the authority to board U.S. tuna purse seine vessels in port for the purpose of inspecting vessel logs and observing the unloading of the catch. A motion requesting an order to this effect accompanies this plan.

Since fishing is closer to shore in the early part of the season when optimum weather conditions pervail, the aerial surveillance proposed will provide reasonably effective enforcement during phase A. Surveillance under the proposed plan can begin within 72 hours following issuance of the court order. It should be noted, however, that additional funding is required for the air surveillance enforcement program since current expenditures by the Department under the Marine Mammal Protection Act are very close to the authorization limit of that act. To obtain funds expeditiously, the Department will use a portion of the nonappropriated funds available from the small reserve of Saltonstall-Kennedy funds (a portion of fisheries import duties). The Office of Management and Budget has been requested to apportion such funds.

PHASE B

Immediately following the adoption of 1977 final regulations and, as appropriate, the approval of an application for a general permit and the filing with the court, phase B of the plan will be implemented. This phase will cover the period from about mid-April through December 1977. The Secretary will not require a separate court order to implement this phase of the plan.

In phase B the Department will move to an increased observer program. The Department's plan is to place trained scientific observers aboard U.S. tuna purse seine vessels for approximately 130 trips during the remainder of the 1977 yellowfin tuna season. The placement of these observers will be a condition of certificates of inclusion issued to individual fishermen under the general permit. This number represents approximately 43 percent of all trips to be made by purse seine vessels after mid-April. This plan will require increased authorization under the act and a supplemental appropriation. A request for a supplemental appropriation of $1.1 million for each of fiscal years 1977 and 1978 has been approved by OMB and will be submitted shortly to the Congress. A bill to increase authorization levels will also be submitted.

It is the objective of the Department to move as close as possible to a 100 percent observer program for vessels 400 tons and above as Departmental resources permit. In addition to the supplemental appropriation now being sought to cover the 130 trips, the Department will request OMB to seek from Congress the further resources necessary to achieve full observer coverage of the fleet.

Scientific observers will be responsible for providing radio reports twice weekly on the numbers of each species or stock of porpoise killed during that period. These data will then be used to project the total incidental kill of each species or stock to date and the anticipated quota closure date if the mortality continues at the same rate. When any individual quota is filled, further setting on that species or stock will be prohibited for the remainder of the year. The use of observers to collect information on compliance with regulations, is a more effective method of monitoring fleet activities than aircraft surveillance during the latter part of the year when most fishing is in areas seaward of the effective range of available surviellance aircraft.

The primary objectives of phase B are: (1) to limit the incidental kill of porpoise, governed by specific quotas, that may be taken by U.S. tuna purse seiners fishing for yellowfin tuna; (2) to obtain specific information about the effectiveness of regulations on reducing porpoise mortality; (3) to evaluate the compliance records of individual fishermen; and (4) issue citations in case of infractions of the regulations.

The plan, as proposed, should adequately meet the overall objective of phase A and phase B to protect porpoises and ensure that individual species or stock quotas are not exceeded. The plan embodies the application of both the resources now available and which can reasonably be anticipated to be available in the near future.

Attachment.

FEBRUARY 14, 1977.

Summary of ALJ recommended decision and conclusions	NMFS final decision	Comments
It is concluded and recommended that regulations be amended to include the changes suggested by the agency in subsec. (d)(iv)(A) (i) and (ii) above. (Insertion of 1¼ in. porpoise safety panel.)—p. 37.	Adopted 216.24(d) (iv)(A) (1) and (2).	
Rather it is here concluded, that sec. (a)(iv)(J) of the regulations should provide that (1) all tuna boats must have an order the nets before they can fish on porpoise and (2) that the vessels must install the nets within 10 days of the next arrival back in port after delivery of the nets, or Apr. 30, 1977, as the latest date for installation—p. 38.	Adopted 216.24(c) (5)(vi).	Installed upon receipt or before starting a new voyage if delivered while at sea.
Therefore, as a start at the very least, it is concluded and recommended that the regulations should require that all vessels be equipped with adequate floodlights and that they be required to be used if the backdown procedures occur in darkness—p. 43.	Adopted 216.24(d) (iv)(K).	
It is also found that the use of rescuers on speedboats and/or rafts during sundowners lessen porpoise mortality it is concluded and recommended and that the regulations should require these procedures where the backdown occurs in darkness—p. 43.	Already required on all sets. 216.24(d) (if)(J).	Modified to include face masks.
It is concluded and recommended that the regulations should provide for the mandatory use of faceplates and for the use of rubber rafts in addition to the number of speedboats required presently in the proposed regulations—p. 44.	Adopted 216.24(d) (iv)(J).	
However, the regulations should also provide that in lieu of the faceplate, a rubber raft with a glass bottom may be used—p. 44.	Not adopted	Glass-bottom boat use not tested—p. 29 of decision.
It is concluded and recommended that the regulations should require two speedboats on all classes of vessels unless and until it is shown with some certainty by the holder of the certificate of inclusion that a second speedboat will in fact displace the observer—p. 44.	Adopted 216.24(d) (iv)(G).	
Absent this information it is found that the publication of a vessel's mortality may result in a baseless and unjustified emotional response against those operating the vessel—p. 51.	Concurred	
In this regard, the undersigned is of a view that the SP can be the linchpin to this end. (Skipper panel.)—p. 52.		Permit Holder must form a skippers panel—p. 22 of decision.
It is concluded and recommended that the regulations be amended: To create a SP along the lines suggested above and (2) that upon the recommendation of a majority of the SP to revoke or suspend a certificate of inclusion, the NMFS shall execute such recommendation forthwith, or at a minimum it should be given great weight—p. 54.	Adopted. Not in regulations, will be in permit.	
It is concluded and recommended that the aforementioned subsection be amended to include that there shall accompany such copies of the logs a statement under oath, in affidavit form, attesting to the truthfulness of the information reflected in the marine mammal logs—p. 55.	Adopted 216.24(d) (iii).	
It is also found and concluded that, in accordance with sec. 1373(a) of the act, they are based upon the best scientific evidence available at this time. It is concluded further that the NMFS published a statement of the estimated existing levels of the species and population stocks of the marine mammals concerned as required by sec. 1373(d)(1) of the act—p. 66.	Concurred—p. 7 of decision.	
In the same "Federal Register" notice is also published a statement describing the evidence before it upon which the NMFS proposed to base such regulations and any studies or recommendations made by or for it, or by the Marine Mammal Commission which related to the establishment of the regulations, and it is so concluded—pp. 66 and 67.	do	
Based upon an evaluation of the record evidence on OSP and the testimony of Dr. Fox it is found and/or concluded that the lower bound of OSP is 50 pct of the unexploited population of the specie or stock—p. 73.	Did not adopt	Adopted a range of 50 to 70 pct. Insufficient evidence to support selection of a single value—p. 12 of decision.
In light of the findings above concerning the lower bound of the OSP to be 50 pct of the unexploited population of the specie or stock and the testimony of Dr. Fox it is found and concluded that the eastern spinner dolphin is not depleted—pp. 75 and 76.	do	Eastern spinner depleted based on probability even though at 54 pct of initial stock size—p. 14 of decision.

Summary of ALJ recommended decision and conclusions	NMFS final decision	Comments
It is accordingly found and concluded that separate quotas for the different species and stocks are required by realities of preserving population levels and by the appropriate provisions of the act—p. 80.	Adopted—p. 19 of decision.	
First, the writer interprets the court's language with regard to the three "issues" before it as holdings, pure and simple, and not dicta as advanced by some of the parties—p. 85.	Concur	
It is found and concluded that the mortality limitations for the U.S. fleet in 1977 should be that expressed generally above by Dr. Fox and shown specifically on appendix J; that these quotas assure the protection of these mammals; and that such quotas would not be to the disadvantage of the various species and stocks and are consistent with the purposes of the act—p. 87.	Adopted as upper biological limits which would not disadvantage the populations—p. 16 of decision.	Promulgated lower 1977 quotas in recognition of act's requirement to reduce incidental mortality and the determination that eastern spinner is depleted—p. 19 of decision.
In view of the finding above, however, permitting the domestic fleet a quota of about 88,000 for the three target species plus approximately 8,200 for minor species, the division of the quota issue would appear moot and it becomes unnecessary to determine, essentially, whether equity or logic should prevail—p. 90.	Concurred	
It is concluded that the NMFS should consider modifying the regulations to provide something along the lines that in any hearing under sec. 1375(a) the reasonable margin of error existing in the tuna fleet in identifying porpoise schools should be given appropriate weight and if the party comes within such margin it shall then be considered presumptive evidence of not being in violation—p. 97.	do	No regulations at this time—enforcement guidelines will be developed.
As for the eastern spinner, since it has been determined that it is close to the lower bound of OSP, it is concluded and recommended that the regulations also provide that no fishing on pure schools be permitted—p. 99.	Adopted 216.24(d)-(2)(i)(A).	Also adopted mixed school prohibition since eastern spinner is depleted.
It is also concluded and recommended that an unintentional incidental take will be permitted only in mixed schools of eastern spinner until its quota is met—p. 99.	Not adopted. No eastern spinner quota.	However, enforcement guidelines will be developed regarding accidental taking.
It is found that the proposed regulations in 1977 will result in a decline in the supply of all tuna, domestic and foreign, particularly yellowfin—p. 113.	Concurred	
The evidence is persuasive, and it is so found, that the regulations as proposed by the NMFS would encourage transfer of seiners to foreign flags under appropriate circumstances—p. 120.		
The evidence suggests and it is found that this period be 21 days and it is concluded and recommended that the regulations be amended to reflect such—p. 123.	Not adopted	21-day notice requires 36-day projection. 7 days with weekly estimates was adopted—pg. 23 o decision.
Notwithstanding the unspecified uncertainties the NMFS may have concerning the obligation of an exporter to identify the contents of a can concerning the type of tuna, it is found and concluded that an exporter desiring not to be subject to subsec. (e)(iii) must label contents as "Tuna Fish, Other than Yellowfin" or like language—p. 137.	Adopted 216.24(e)(2)(ii).	
It is concluded and recommended that subsec. (e)(iii) be so amended—p. 137.	do	
Therefore, as an alternative to the deletion of the entire crew list from subsec. (e)(5)(i)(A) it is concluded and recommended that the regulation seek a certified list of U.S. citizens crewing foreign seiners—p. 138.	Adopted 216.24 (e)(5)(ii)(G).	Nations seeking a finding must identify U.S. citizens crewing foreign vessels.
Also, it is found that subsec. (e)(iv)(F) providing for copies of an exporting nation's laws and regulations which protect marine mammals does not go far enough—p. 138.	do	
Official notice is taken that laws sometimes go uninforced coming to grips with reality, it is concluded and recommended that this section should also provide for a statement concerning what past enforcement actions have transpired under such laws or regulations—p. 138.	Not adopted—p. 25 of decision.	Information requested for a finding asks for procedures to be used to prohibit sets.
Additionally, it is found and concluded that the phrase appearing in subsec. (e)(5)(i)(B) and reading "in excess of that which results from U.S. fishing operations under these regulations" is not too vague—p. 138.	Concurred	
It is concluded and recommended that a 3-month grace period be allowed for the effective date of import regulations—p.140.	Adopted 216.24 (e)(5)(i).	Effective June 1, 1977.
It is so found. However, it is also concluded that there exists no legal requirement on the part of the vessel to continue to permit observers to remain aboard after the quota has been reached—p. 151 and 152.	Concurred—p. 21 of decision.	
It is found that this addition to the regulations will aid greatly in attaining the purpose for which it is proposed. It is concluded and recommended that final regulations contain such a provision—p. 152.	Adopted 216.24(f)(2)	Navigators must give observers a location upon request.
It is thus concluded further, that subsec. (d)(2)(L) of the proposed regulations, concerned with application procedures for a general for "Encircling gear; yellowfin tuna purse seining" meets the requirements of the act—p. 155.	Adopted 216.24 (d)(iv)(N).	
With regard to these sections it is concluded that they have been promulgated in accordance with the appropriate sections of the act and their adoption in final form is recommended—p. 155.	Concurred—p. 6 of decision.	

Mr. MANNINA. Thank you.

With respect to expansion of an observer program, do you have adequate funding in your 1977 authorization, to expand observer programs, or will expansion of the program require additional supplementation of authority?

Mr. POLLOCK. We do not have enough money.

We have a supplementary budget request.

Mr. MANNINA. Does the authorization need to be increased?

Mr. POLLOCK. Yes; it does.

Mr. MANNINA. Could you submit the appropriate information as to the amounts that you feel are necessary?

Mr. POLLOCK. We will be happy to do that.

[The material was not available at time of printing.]

Mr. MANNINA. Mr. Brewer, in the response to Mr. Rogers' questions, you indicated that national defense was the primary reason on which you recommended denial of the application for the transfer of tuna vessels to foreign flag.

However, does not 46 CFR 221.7 also provide that you can deny a proposed transfer on foreign policy.

Mr. BREWER. My intention was to state, Mr. Mannina, that in previous instances where transfers had been denied, the ground used by the Maritime Administration had been national defense. I believe that is correct.

It is not our position, however, that that should be the only ground, and I did not mean to so indicate.

Mr. MANNINA. Would you view sections 108 and 101 of the Marine Mammal Act as establishing the policy of the United States with respect to marine mammal conservation?

Mr. BREWER. That would be my judgment.

Mr. MANNINA. And with respect to that foreign policy, it would be one ground for recommending denial of the transfer, if these vessels are not going to be fishing consistent with the act.

Mr. BREWER. That certainly could be a possible ground for so recommending; I would agree with that.

Mr. MANNINA. Thank you.

Mr. STUDDS. May I?

Mr. MANNINA. Yes.

Mr. STUDDS. Did I understand correctly that for a U.S. flag fishing vessel to transfer to another flag requires the permission of some other part of the Government?

Mr. BREWER. A U.S.-documented vessel must get the consent of the Maritime Administration for transfer to a foreign purchaser.

Mr. STUDDS. Thank you.

Mr. MANNINA. Do you feel you have the authority under the statute to establish a per vessel quota on the incidental taking of porpoise?

Mr. BREWER. We have considered a per vessel quota, and we think we have authority to do it under the statute, but have not elected to do so.

Perhaps Mr. Schoning would care to comment on it.

Mr. SCHONING. Speaking for the service, we would have to explore that very carefully, because of many implications.

Obviously it has advantages and disadvantages, and we are not prepared to take a position on that at this time.

We are looking to other approaches that have greater merit.

Mr. MANNINA. Thank you.

During the research cruise of the *Elizabeth* C.J., approximately 30,000 porpoises were set on, and I understand the kill of porpoise was approximately 16, of which only 4 were killed during fishing operations.

The NMFS report on the cruise suggests that these results were achieved because of a new "super apron" and because of the skill of the crew and the captain.

Given this extremely low mortality rate, can you comment on what efforts are being made to upgrade the skill of other vessels in the fleet, and what your plans are for expanding the *Elizabeth* C.J. system to other vessels?

Mr. POLLOCK. I think we are on dangerous ground again, if I might respond.

These are items that are under consideration in our regulations, and I really would prefer we not answer at this time.

Mr. MANNINA. Thank you.

Mr. LEGGETT. Thank you, Mr. Mannina.

Mr. Spensley?

Mr. SPENSLEY. I just have one question.

The court of appeals order by the Secretary of Commerce was to investigate any violations, or apparent cause——

Mr. POLLOCK. The order issued to the Secretary by the District of Columbia Circuit Court?

Mr. SPENSLEY. Has any—do you have any current violations that have been discovered?

Mr. POLLOCK. It is my understanding we have no report, and we have no knowledge of violations of any kind.

Mr. LEGGETT. And the bounty program, of course, is still under full force and effect, that anybody reporting violations can collect, what, $2,500 or $5,000, all right.

Mr. POLLOCK. This is still in effect.

Mr. LEGGETT. There has to be hard evidence, and not hearsay.

Well, I think this—that again, without motivating you on your regulations, in view of the fact that we have had *Bold Contender* experience, and *Elizabeth* C.J. experience, to the maximum extent feasible, where we can develop regulations to get to an overall fleet operable program like *Bold Contender* in their best days, and like *Elizabeth* C.J. in her best days, then I think we would be approaching the target of zero mortality set in the original Marine Mammal Act, and I would certainly hope that your Agency would be exercising every due diligence to achieve that result, and if you need additional legislation, we would like to have your recommendations in that regard.

Mr. POLLOCK. Mr. Chairman, I can assure you that we are exercising every due diligence, and notwithstanding the delays, we are trying to move as speedily as possible.

Mr. LEGGETT. Mr. Oberstar?

Mr. OBERSTAR. Thank you, Mr. Chairman.

Mr. Schoning, last year in the course of similar hearings by this committee, I asked you questions about the porpoise populations. Your response at that time was there had been surveys, estimates made of certain species, I think there were three species, if I recall, and I am wondering now if you have been able to expand that survey to include other species, and whether you have any more accurate estimates on which to base the quota that you mentioned, that is mentioned on page 4 of Mr. Pollock's testimony.

Mr. SCHONING. Dr. Fox will answer that.

Dr. FOX. Just as a little bit of background. The group of population experts that met in La Jolla identified 21 possible or tentative stocks of porpoises in the Eastern Pacific. They were combined for management purposes into 17 stock management units. Of those 17 stock management units, we were able to come up with population estimates for 13. There were no estimates for 4 of the 17 units.

Mr. OBERSTAR. What do they total for those 17?

Dr. FOX. Approximately 8 million.

Mr. OBERSTAR. Eight million, and are the quotas you are going to be recognizing based on that population estimate?

Mr. POLLOCK. Again, I would prefer that we not go into that at this time.

I really regret not being at liberty to answer these questions to the best of our ability, but we simply cannot.

Mr. OBERSTAR. Then let me observe.

It seems very reasonable, based on the face of 8 million, it is substantially larger than the 3 million count that you were about to provide the committee in our hearings last year.

You have done a commendable job in reducing the number of kill down to 100,000. It is a very inconsequential number compared to the stocks.

What is based on that 8 million, what is the number your scientists estimate died of natural causes in the course of a year?

Dr. FOX. First, I would like to qualify the 8 million. The 8 million is for all 13, however three principal species and stocks account for 95 percent of the mortality.

The midpoint estimate of the population for those three species is roughly 5½ million. But that is the midpoint estimate. We have approximate limits on 3½ to 7½ million.

So it could be as low as 3½ million under our present understanding of the situation, or as high as 7½ million.

We have estimates of natural mortality rates for just one stock of animal.

The principal stock involved, the offshore spotted dolphin, is at about 9 percent per year. Its midpoint estimate is about 3.7 million, so on the order of 350,000 animals per year of that population die naturally.

Mr. OBERSTAR. Do you have estimates of the number of dolphins taken by foreign fishing fleets in the same area where ours are fishing?

Dr. FOX. We may have made estimates, although estimates of the foreign fleets are very difficult.

Now, from the Inter-American Tropical Tuna Association's log book system, we can get estimates of the number of sets on porpoises by all foreign flag vessels.

The difficulty then is in determining what their kill rate on each set is. We have assumed that the kill rate is approximately like that of the United States before the major forces of the Marine Mammal Protection Act came to bear on the fleets.

With that we made estimates that range up to approximately 40,000 for the recent years.

Mr. Oberstar. About 40,000, you are saying?

Dr. Fox. Yes.

Mr. Oberstar. You say then that American fishermen are taking the overwhelming preponderance of the dolphin take in connection with tuna fishing?

Dr. Fox. That is correct. For the most recent year where we have made estimates for both the domestic and foreign fishing, the foreign fisheries took 24 percent, and the United States 76 percent.

Mr. Oberstar. Will the foreign dolphin kills be subject to U.S. regulations under the 200-mile legislation?

Dr. Fox. No, I do not believe so.

Mr. Oberstar. So there is no way that, by the 200-mile limit, the United States can effect protection of foreign kill of porpoise?

Mr. Oberstar. So the only way we can effect dolphin kill is by international negotiation, hopefully?

Mr. Pollock. Or import restrictions, as Mr. Brewer and I indicated earlier.

Mr. Oberstar. Import restrictions, are we doing that?

Mr. Pollock. I do not know if we are doing it.

Mr. Oberstar. Do we have the mechanism?

Mr. Pollock. I think Mr. Brewer would like to respond more fully.

Mr. Brewer. Mr. Chairman, I understand your point of view.

Of course, we are requiring certificates with respect to origin of imported tuna, and have done so for some time.

You have mentioned in the past that the efficacy of such certificates might be open to question, and we are in the process of tightening up procedures considerably.

The Chairman. Other than receiving the certificates, has the Department done one single thing to investigate even the validity of the signature on the certificate?

Mr. Studds. Let the record show that counsel is casting about the back of the room, and nothing is forthcoming. [Laughter.]

Mr. Brewer. I am afraid that is correct.

The Chairman. We understand where we are.

To clear up one thing Mr. Oberstar brought up, the foreign fleet is catching in the order of one-third of the tuna, and we were taking in the order of 300,000 porpoises, before we passed the 1972 act, according to the best impressions of the American fleet.

Why then is not our estimate that the foreign fleet is taking 100,000 porpoises, rather than 40,000 that you mentioned?

Mr. Pollock. Dr. Fox would like to respond.

Your question is, I think, what is the ratio of the take, foreign against domestic, and porpoises killed, foreign and domestic.

Dr. Fox. The take of yellowfin tuna and porpoise is lower relative to the United States than the kill of porpoise by the foreign fleet relative to the United States. We assume that the kill rates of the foreign fleet in terms of the number of animals killed are roughly 2.5 times more than in the United States.

There have been substantial reductions of United States kill since 1972. So that would lead to a higher proportion of the kill than one would expect by looking at the proportions of the catch of yellowfin tuna.

The Chairman. Then they catch a third as much as we do, but are twice as inefficient. It would seem, then, that their take of porpoises would be considerably higher than the normal number that you talked about.

Mr. Pollock. May we answer for the record?

The Chairman. If you would provide these numbers and calculations for us, that would be helpful.

[The following information was provided in response to the foregoing:]

Relationship between U.S. and non-U.S. catch of yellowfin tuna and porpoise mortality in the Eastern Tropical Pacific Ocean—1975.

	Percent
Yellowfin tuna associated with porpoise:	
United States	85.4
Non-United States	14.6
Estimated porpoise mortality incidental to yellowfin fishing:	Percent
United States	75.2
Non-United States	24.8

Sources: Table 1, Page 106 Progress of Research on Porpoise Mortality, Fiscal Year 1976. September 7, 1976. Table 4, Page 6–9, Report of Workshop on Stock Assessment of Porpoises, September, 1976.

Mr. Oberstar. It would seem to me that these numbers are highly speculative. They are under no obligation to report. There is no compulsion on the part of their government, whereas in the United States enforcement is obvious. Committee hearings have highlighted this.

Publicity in the news has put pressure on the industry, and they are doing an honest job of reporting.

On page seven, Mr. Pollock, of your testimony today, "you may come to a situation where we will be forced to consider legislation designed to minimize some of the obvious conflicts."

What kind of legislation, what subject area would you suggest, and what action do you recommend the committee to take as a result of these hearings?

Mr. Pollock. Mr. Oberstar, I have a problem that is not dictated by the court order at all, but we are in the process within the administration to resolve some of the difficulties on the way we approach this.

Our National Marine Fisheries Service has some ideas, NOAA has some ideas, and other people have taken a look at this. We have not formulated a policy within the administration, and hope to do so very soon.

Mr. Oberstar. Does this rethinking process include reconsideration of the goals of the 1972 act, or maybe of 30?

Mr. Pollock. That is one possibility.

Mr. Oberstar. Thank you very much.

Mr. Leggett. Thank you, Mr. Pollock.

I may say this again, whether or not 100,000 is an insignificant number compared with 8 million, is not part of the current act. So we do not need witnesses coming forward explaining that. That is just a waste of the time of the committee.

Thank you very much, gentlemen.

Mr. Bonior. Mr. Chairman?

Mr. Leggett. Yes, Mr. Bonior.

Mr. Bonior. One question that you may be able to answer.

Has the Law of the Sea Conference addressed this problem at all, the dolphin problem?

Mr. Pollock. It has not.

Mr. Leggett. But the Inter-American Tropical Tuna Convention has brought it up, has it not?

Mr. Pollock. Yes, indeed, but those are two quite different forums.

Mr. Leggett. And no resolution has come forth from those forums?

Mr. Bonior. Mr. Chairman?

Mr. Leggett. Mr. Bonior.

Mr. Bonior. If there is a resolution, what effect will it have on your forthcoming regulations?

Mr. Pollock. Well, I am not sure how to answer that. Over a period of some years we have been meeting with other nations in the Inter-American Tropical Tuna Commission, trying to set limits on take, allocations to different countries, types of gear, and so forth.

Some of the countries off whose shores the tuna are taken, are not members of the IATTC. What we are trying to do in the Law of the Sea—and that is perhaps what you are referring to—in the regulation of the highly migratory species, including tuna, to get a mandatory requirement for participation by the adjacent coastal states for the tuna, but we have not thus far succeeded in that. That is the United States position.

We will have further comments on that by Dr. Fox.

Dr. Fox. The Inter-American Tropical Tuna Commission does have a resolution concerning the porpoises. That was achieved by the United States in the last meeting of the Inter-American Tropical Tuna Commission last October. The Commission has a charge to design a comprehensive research program. By the first of June, there will be a special meeting of the Commission to consider implementation of the research program designed by the Tuna Commission.

Mr. Leggett. That is very good news to hear.

Let me ask you just one question before we dismiss you.

Does NOAA believe the existing fishing circumstances which we find ourself in are advantageous or disadvantageous to the continuity of the Inter-American Tropical Tuna Commission?

Do you understand the question?

Mr. Pollock. I understand the question. I do not think there is a direct connection. I was thinking instead it might not be directly affected one way or the other, but I am not sure.

Mr. Meibohm advises me that it might cause unduly heavy fishing of yellowfin tuna, or small immature fish.

Mr. LEGGETT. That corresponds to testimony before the committee last year, that fishing by a large fleet for an extended period of time might cause extended fishing of immature fish. That might abort the convention.

Mr. POLLOCK. I think Mr. Brewer, our general counsel, has a comment.

Mr. BREWER. If for some reason there is a number of the U.S. fleet who do go foreign flag, they may go to countries who are not members of the IATTC, namely, a flag-of-convenience country.

If that occurs, I am sure the effectiveness of the convention will be greatly diminished.

Mr. LEGGETT. We are not going to let the American fleet go foreign. [Laughter.]

Mr. POLLOCK. Mr. Chairman, we appreciate your forebearance and tolerance. Yours and the other members, because of the sensitivity of some of the questions.

Mr. LEGGETT. We appreciate your cooperation, too, Mr. Pollock.

The next witnesses are the organization structured to solve this problem.

At the outset, the Marine Mammal Commission, and its Chairman, Mr. Douglas Chapman.

Mr. Chapman, I understand you have no formal statement, so you can make any comment you care for the record.

STATEMENT OF DR. DOUGLAS G. CHAPMAN, CHAIRMAN, MARINE MAMMAL COMMISSION, ACCOMPANIED BY ROBERT EISENBUD, GENERAL COUNSEL

Dr. CHAPMAN. Thank you, Mr. Chairman, for the opportunity to appear before you today at these oversight hearings.

I am Douglas Chapman, Chairman of the Marine Mammal Commission. On my right is Robert Eisenbud, our general counsel.

Many aspects of the tuna-porpoise problem were discussed in the Commission's Annual Report for calendar year 1976, which has been made available to you and the members of the subcommittee. If there are others who wish copies, they can obtain them from the Commission.

As has been noted several times, the 1977 regulations are under development at this time and, unfortunately, it is not appropriate to discuss them.

We are concerned, of course, as others are, about delays in the implementation of these 1977 regulations. Others, the industry witnesses, will no doubt speak to you of the problems that have been caused them. The Commission is also concerned about problems that may be caused to the porpoise population as a result of the possibility that foreign vessels are setting on porpoises, which they might not ordinarily do, and therefore cause additional kill.

When we last appeared before you, in September, Dr. Kenneth Norris and I discussed the research cruise which was jointly sponsored by the Commission, the Research Applied to National Needs

(RANN) Directorate of the National Science Foundation, the National Fisheries Service, and the tuna industry's Porpoise Rescue Foundation. This research cruise was conducted in October through December last year.

I had hoped that Dr. Norris would be able to be here today with me to report on the conduct and results of the cruise but he has not been able to be here because of conflicts in his schedule. I can, however, summarize the encouraging results of this cruise. Some 30,000 porpoises were captured in the course of catching 915.5 tons of yellowfin tuna. In only 5 of the 45 sets was there any porpoise mortality, and only four deaths could be attributed to regular fishing operations. This is a mortality rate of .004 per ton of tuna caught, which compares extremely favorably with the approximately one or more deaths per ton of tuna taken in the past year under normal operations.

Mr. LEGGETT. That is the target set by the Marine Mammal Act.

Mr. CHAPMAN. That is correct; 0.004 porpoises per ton of tuna is an insignificant rate approaching zero.

Mr. LEGGETT. So the natural question arises, why cannot the target be achieved for everybody?

Mr. CHAPMAN. Well, I will speak to that in just a moment, Mr. Chairman, if I may.

The low mortality was achieved as a result of many factors—the care taken by the skilled captain and crew, the super apron they used, and the double depth safety panel of one and a quarter inch mesh. The use of a small inflatable raft by a man with a snorkel to direct the backdown operation until all porpoises had been released was also an important factor.

It became more generally known that some porpoises exhibit so-called sleeper behavior. They sink down and rest for a while before rising back up to the surface. The research cruise demonstrated that continuing the backdown operation, until these sleeper animals come to the surface and pass out of the net, allows these animals which would otherwise probably die to be rescued.

Mr. LEGGETT. Now, you did not mention time periods. Would you say that the time that is taken by the *Elizabeth* C.J. in backdown and recovery is different than the normal tuna boat time that is taken for backdown?

Mr. CHAPMAN. I believe it would be, though I do not have adequate records on the regular operation, but generally I believe that those who are involved in this research think that is correct.

Mr. LEGGETT. Of course, the statistics were all gathered, as I understand it, during relatively calm weather.

Mr. CHAPMAN. I think they had favorable weather conditions, and I think it is one of the reasons to continue the efforts begun on the *Elizabeth* C.J. research cruise. We must determine what problems arise under other situations and the extent to which the successful techniques used on the *Elizabeth C.J.* are transferable to other vessels and conditions. I will be coming to that in just a moment.

A cruise report has just been sent to all certificate holders, and we just received a report on the aspects of the cruise. Those reports will be made available for the record.

In addition, some 8,000 feet of film are being carefully analyzed by Drs. Norris and Stuntz, under contract with the Commission, to gain further insight into tuna-porpoise behavior.

A research workshop has been scheduled for February 28, March 1 and 2. This workshop will be jointly sponsored by the Commission and the National Marine Fisheries Service. Participants in the workshop will review recent research efforts and discuss research plans for 1977. The further research for 1977, to a large degree, centers on the dedicated vessel that has been the subject of discussion between the Marine Mammal Commission and the tuna industry for some time. The industry pledged funds for a dedicated vessel at the previous oversight hearings, and also in the course of the hearings that were held by the administrative law judge in connection with the 1977 regulations.

A task force has been set up to develop plans for research aboard that vessel on various aspects of the problem in 1977. The task force has representation from the Commission, from the National Marine Fisheries Service, and from the Porpoise Rescue Foundation and others.

The Commission has recommended that a person be named to the position of scientific manager as soon as possible to direct the research efforts, and we have agreed to fund the costs of the position as soon as the industry has made a final commitment that there will, in fact, be a dedicated vessel available. We have entered into negotiations on this particular subject, and we are waiting for the final decisions by the tuna industry.

With respect to the problem of possible transfer of U.S.-flag vessels to foreign flags, the Commission has written to the Maritime Administration expressing its concern and recommending that applications for transfer be denied or that a bond be required to insure that the transferred vessel will adhere to U.S. regulations if it was transferred. As yet, we have not had a reply from the Maritime Administration.

In addition, we have been involved in correspondence and discussions with the staff of the Secretary of State with respect to the placement of observers on foreign vessels, in order to get better data on the kill on foreign flag vessels, and hopefully to meet the problem that you have already referred to, Mr. Chairman, of how to insure that foreign vessels are in fact fishing in accordance with U.S. standards.

We have been pleased to learn that the National Marine Fisheries Service intends to apply Saltonstall-Kennedy funds to meet expenses for the observer program. As you know, the Commission recommended that SK funds be applied to the tuna-porpoise problem some time ago. That recommendation has been under consideration by the National Marine Fisheries Service. We are pleased to learn that they have now determined that they will be able to use those funds for that purpose. Saltonstall-Kennedy funds should be applied to support the various activities that are necessary to solve this particular problem.

That concludes my statement, Mr. Chairman. I will be glad to answer any questions, with the help of Mr. Eisenbud, that you or any member of the committee may have.

Mr. LEGGETT. Thank you very much.

Mr. Eisenbud, do you have anything else to volunteer?

Mr. EISENBUD. No, Mr. Chairman, I do not think so, except to offer for the record those reports which were mentioned by Dr. Chapman, and a copy of the letter that we did send to the Maritime Administration, recommending that vessels not be permitted to transfer, or that bonds be imposed on transfers, if they are permitted.

[The following was submitted:]

REPORT ON THE TUNA-PORPOISE CRUISE TO THE MARINE MAMMAL COMMISSION

(By Warren E. Stuntz, Ph. D.)

The tuna-porpoise behavior cruise, undertaken as a result of the Marine Mammal Commission's 1975 workshop, was a cooperative effort between the University of California at Santa Cruz (USC), funded by the Marine Mammal Commission, San Diego State University (SDSU), and the Naval Undersea Center (NUC), funded by the National Science Foundation (NSF), the National Marine Fisheries Service, and the tuna industry. The following personnel participated: Dr. Kenneth Norris, UCSC; Dr. Warren E. Stuntz, UCSC; Dr. Frank Aubrey, UDSU; Dr. Edward Mitchell, Environment Canada; Dr. William Perrin, NMFS; Dr. Nancy Lo, NMFS; Mr. James Coe, NMFS; Mr. David Holts, NMFS; Mr. William Rogers, UCSC; Mr. Phillipe Vergne, Living Marine Resources; Mr. Joseph Thompson, Sr., Seavision Productions; Mr. Joseph Thompson, Jr., Seavision Productions; Ms. Karen Pryor, Porpoise Rescue Foundation; Mr. Stephen Leatherwood, Naval Undersea Center; Mr. Donald Ljungblad, NUC.

Two vessels were employed for the cruise, the tuna purse seiner *Elizabeth C. J.* and the NOAA research vessel *David Starr Jordan*. The *Jordan*, Milton Roll, Master, left San Diego on 5 October 1976 and the *Elizabeth C. J.*, Manuel Jorge, Master, left San Diego on 11 October 1976.

During the first leg of the cruise, 14 data collection sets and 7 normal fishing sets were made by the *Elizabeth C. J.* During these 21 sets a total of 12 porpoise, 11 *Stenella attenuata* and 1 *Stenella longirostris*, were killed. The data collection sets were as follows:

Set No.	Date	Position	Tons tuna	Number of porpoise	Porpoise killed	Remarks
1	Oct. 16	11N, 113W	0	0	0	Water set.
2	Oct. 17	10N, 109W	65	1,350	7	Orientation set.
3	Oct. 18	11N, 109W	25	950	1	Tagging set.
4	Oct. 27	09N, 105W	65	1,033	0	Standard set.
5	Oct. 27	09N, 106W	8	300	0	Do.
6	Oct. 25	09N, 104W	10	213	0	Tagging set.
7	Oct. 26	09N, 105W	70	1,066	0	Recapture set.
8	Oct. 27	09N, 105W	18	166	4	Tagging set.
9	Oct. 20	10N, 108W	15	350	0	Standard set.
10	Oct. 29	09N, 104W	55	1,000	0	Do.
11	Oct. 31	09N, 107W	4	90	0	Do.
12	Oct. 31	09N, 107W	6	625	0	Do.
13	Nov. 1	10N, 108W	8	816	0	Do.
14	Nov. 2	10N, 109W	8	266	0	Do.

The *Jordan* left after 2 November for Manzanillo, Mexico, to refuel and to make changes in scientific personnel. On her return and rendezvous with the *Elizabeth C. J.*, it was planned to do a tagging set after which the *Jordan* would follow the radio tagged animals for as long as possible before returning to San Diego. Difficulties with all the tracking receivers resulted in the scientists having to settle for simple observation of the set.

15	Nov. 12	13N, 101W	4	366	0	Standard set.

During standard sets, scientific personnel were placed at different vantage points to maximize data collection. Personnel on the tuna seiner observed surface behavior and dive frequency, and personnel in the water recorded underwater behavior. On some sets scientists observed from the helicopter, and during all sets photography of some phase of the operation was done.

The following is a description of the general behavior of tuna and porpoise relative to the fishing operation. Since data analysis is only beginning, the *conclusions are subject to change and refinement.*

PRE-CHASE BEHAVIOR

Porpoise schools, at least in the areas fished, are normally found by spotting bird flocks through high powered binoculars since birds are seen before the porpoise which are over the horizon. A majority of the schools found responded to the helicopter when it was sent out to determine if the school was carrying fish. In one case, a porpoise school was observed that did not seem to be affected by the helicopter. This school was spread out over a large expanse of ocean (3–5 km^2), and was accompanied by a large flock of birds, mostly boobies. The porpoise were very spread out, with perhaps 20 to 30 body lengths between groups or individuals. Group size varied from 1 to 5 animals. There was no apparent orientation to the school, and animals moved in all directions. Some animals may have been feeding since they dove deeply enough to disappear from sight. Other animals moved about in the school and stayed shallow enough so that they were always visible at least over the short periods (about 1 minute) that it was possible to watch one individual or group. Only a few leaps were observed during a period of 30 minutes over the school. When animals surfaced to breathe, there was only a minor surface disturbance. At one point, the *Elizabeth C.J.* attempted to move closer to the porpoise and the animals immediately responded to the boat even though she was 5 to 7 km distant. When the vessel stopped, the animals returned to their previously described behaviors. When disturbed, the porpoise all oriented to the same heading and moved quite rapidly on a course that would have taken them across the bow and away from the ship. Some individuals traveled with long, low leaps that caused considerably more surface disturbance than had been seen from the undisturbed animals. At the end of each leap the animal would move under the water for a distance of about 5 body lengths or more before surfacing again in a long, low leap. Most individuals, however, broke the surface only momentarily with just their dorsal surface before resubmerging. There were all gradations between the surfacings. While underwater the animals generally remained visible to the airborne observer.

During these observations, tuna were occasionally visible. Usually, they were seen only as a dark spot or, if the sun was at the proper angle, one could once in a while see a "shiner". There was no particular, recognizable relationship between the tuna and the porpoise schools, except that they were in the same area.

CHASE BEHAVIOR

The chase began with the launching of speedboats. The speedboats normally operated ahead of the tuna seiner, and were directed by the captain either from the mast or from the helicopter. The goal, to compact the porpoise into a relatively dense school, makes it necessary to force the porpoise into running. This keeps them visible because of the splashes created when the porpoise break the water to breathe. The porpoise observed in the areas fished had almost certainly been set on many times previously, and, during the latter portions of the cruise, we entered areas where the so-called "untouchables" are found. It was thus not possible to observe the responses of naive porpoise to any of the fishing operation. However, a considerable range in behavior was observed during the chase. Some schools, even large schools of 1000 or so porpoise, were rather easily herded. The animals ran well and did not dive if approached too close by a speedboat. Other schools, particularly those observed later in the cruise, would break up, and smaller groups would head off in all directions. In these untouchable schools, animals would not run no matter what the speedboats or the seiner did. Furthermore, even when they were running, the animals would barely break the surface when coming up to breathe. If crowded these animals would often dive and come up outside of the line of speedboats, or go between the last speedboats and the seiner.

During the chase, tuna were more easily observable from the helicopter, than they had been during the pre-chase observations. The majority of tuna were observed to be somewhat behind the deeper than the porpoise school, while lesser amounts of tuna were common at the sides of the porpoise school. Occasionally tuna could even be seen ahead of the porpoise school and also under the porpoise school. When, as sometimes occurred, the porpoise school fragmented during the chase, the tuna school also would usually fragment. In these situations, the helicopter was a valuable tool, which allowed the captain to evaluate which segment of the porpoise school was "carrying" the most tuna.

A major tool in herding porpoise was the wake of the tuna seiner. Porpoise almost never penetrated the seiner wake. The wake of the *Elizabeth C.J.*, when operating at near maximum speed, was distinctly visible for a considerable distance, probably well over 2 km. That long wake was used as a fence to contain the porpoise and thereby stop them from bypassing the tuna-seiner. As the chase progressed, the speedboats would be used to reinforce the wake of the seiner, in areas where the wake had begun to deteriorate. Thus as the seiner spiraled inward toward a circle small enough to set the net, the wake would become more and more effective and the speedboats could be concentrated more in the weakest portion, e.g., directly in front of the bow of the seiner.

DURING SET BEHAVIOR

When the net was let go, porpoise generally stopped running and would be observed milling about in approximately the middle of the area to be encircled by the net. Throughout the rest of the set, one could seldom see more than 10 to 25 percent of the animals at the surface at any one time. Spotter dolphins and spinner dolphins showed different behavior and will therefore be discussed separately, in both their surface and underwater behavior.

Spinners on the Surface.—Spinners spent most of their time on the fringes of the aggregation of spotters. Spinners were present in 50 percent of the sets made during the behavioral portion of the cruise. They were seldom observed to stop moving around the net. In several sets, good data on the diving frequency and duration of spinners was obtained since they were present in small numbers and stayed in one group. Small groups of spinners generally made synchronous dives. They remained submerged for more than 4 minutes occasionally. The group would surface at approximately the same time, take a breath, and dive again in approximately the same order that they had surfaced. Most dives were deep enough to take them out of sight of the observers on the mast of the seiner. Occasionally, they would swim just barely under the water and resurface at intervals so that they were moving in an approximate sine wave pattern. The higher level of activity and their location in the school may well explain why spinners have a higher mortality rate than do spotters.

Spotters on the Surface.—Spotters were in the majority in all but three sets. Their presence in normally high numbers made it difficult to make observations on dive rhythms except in those sets where marked animals were present. Spotters exhibited several types of behavior. The first was "milling", a situation in which the animals are all swimming but the visible portion of the school does not go anywhere. Apparently, when animals surface to breathe, they swim near or on the surface for a short distance before diving again. When resurfacing from the dive, they tend to do so in mid-school. Infrequently, this behavior appeared to be oriented so that all of the surface animals would swim in the same direction while at the surface, giving one the feeling of a water wheel with only a small portion of the whole wheel being visible.

In contrast to spinners, spotted dolphins exhibited several types of aerial behavior which occurred throughout the period in the net prior to backdown. Aerial behavior usually involved only one animal at a time, and the animal was most often a juvenile (two-tone coloration). The most spectacular form of aerial display was a leap out of the water followed by a large splash on reentry either as a result of a belly flop or landing on one side. The animal that made one leap would most often continue leaping at short intervals, occasionally up to 9 times.

Other types of aerial behavior included slapping the water with the flukes, bringing the anterior portion of the body up out of the water to various degrees. The most common behavior of this type was called "nose out" behavior in which the porpoise is quiescent in the water but holds the beak, eyes, and blowhole above the water.

"Nose out" behavior usually accompanied "rafting". "Rafting" behavior is where animals lie quietly at the surface. In most of the spotter schools, some portion of the animals would begin to raft by the mid-point of the set. Rafts seemed to consist most often of juvenile-adult pairs, which were gathered together into groups. The non-rafting animals normally spent most of their time at the perimeter of the rafts. While rafting, "nose out" behavior occurred much more frequently than it did among animals not in a raft.

Spinners Underwater.—Spinner dolphins, as indicated in the surface behavior section, spent nearly all of their time on the move, and groups were often seen. Single sex groupings of adult males were frequently observed. Animals swam close to one another and formed a synchronous diving group. Inter-animal distance ranged from touching to about one meter. Spinners normally remained segregated from the spotters and the two species were never seen swimming together.

Spotters Underwater.—Spotted dolphins also swam in small groups of 2 to 9 animals. The groups most often appeared to be family groups. They engaged in touching behavior very commonly. Most often, the touching was with one animal letting its flipper touch the dorsal surface or flanks of another. Occasionally animals would rub against one another with various parts of the body. On a number of occasions young animals were seen to position themselves directly under an adult such that the flukes of the two animals were aligned. The young animals appeared to be assisted in moving by this method.

Aggressive interactions took place quite frequently. Their frequency may have increased as the net volume decreased reaching a maximum just as backdown was beginning. The data on context of aggression, participants, and timing are just beginning to be analyzed.

BACKDOWN

During backdown, the porpoise are compacted in a relatively narrow environment. Virtually all group behavior, even including adult-young groups to a large extent, seems to disappear. "Rafts" are the only recognizable remaining behavior pattern. Since the *Elizabeth C.J.* is equipped with the "Bold Contender and super apron" type of net, the backdown area is made of 1.25 inch mesh webbing. During backdown, some animals would bang repeatedly into webbing without becoming entangled. One behavior observed frequently on this cruise was "sleeping" behavior, a behavior originally observed by NMFS personnel on an earlier cruise. It appears to be a general phenomenon which may lead to considerable mortality. In "sleeping" behavior, porpoise are seen to lie passively on the net bottom, very often in a ventral side upward position. In standard nets the floor is so deep that these animals, when seen at all, appear to be dead. In contrast, the super apron design creates a shelf, onto which the porpoise are forced during backdown. "Sleeping" animals, on this shelf, are easily seen by a person equipped with a face mask and snorkel, and are even available to a person diving from the surface. Normally, "sleeping" animals come to the surface within about 4 minutes, apparently to breathe. At that time, they can be backed out of the net in the normal fashion. Crew members working in the backdown areas, need to be informed of this behavior and how to respond to it.

With the super apron design, essentially all of the porpoise can be backed out of the net. If a few animals remain in the net, they are easily removed by personnel in the backdown area, when the net becomes very narrow.

POST-BACKDOWN BEHAVIOR

Upon release, the porpoise observed on this cruise were apparently immediately aware that they were free. After going over the corkline, they would make a fairly long, shallow dive and surface in a long, low leap, making a large splash upon re-entry. Usually, all animals would head in one direction on release, and they could be observed continuing high speed travel, with the long leaps and large splashes, for a distance of over 1 to 2 km or more. On some sets, there were two directions of travel after release, with the majority of animals headed in the same direction. Usually animals in the smaller group would turn, after traveling less than 1 km, and rejoin the majority. Released porpoise were followed by helicopter on several occasions. In each case, large splashes were visible for about 4 km, after which the animals would begin to slow. They apparently essentially stopped at a distance of approximately 7 km, and were very difficult to observe. At this point, behavior approximated that observed during the pre-chase situation.

GENERAL COMMENTS

During the course of this cruise, several items became apparent. Probably the most encouraging one is that a properly equipped vessel with a well-trained and concerned crew can fish for tuna by setting on porpoise with a very low mortality rate. The vessel must be equipped with the super apron system that was designed to take advantage of the fact that fish and porpoise maintain different positions in the net—the tuna remaining deeper and more toward the boat and the porpoise remaining generally shallower and more toward the center or far side of the net from the boat. The porpoise must surface to breathe, and, during backdown, surfacing will result in the net being pulled under the porpoise each time it surfaces, until the animal finally ends up over the super apron in shallow water. Tuna, on the other hand, usually stay deep and are thus contained in the deep portion of the net, boatward of that section where the apron begins.

This net configuration should be considered in contrast to either the old style nets or the newer idea of the double depth safety panel, where there is no ramp created to force the porpoise into shallow water. Indeed there can be a large canopy formed in either of these designs which can trap and drown porpoise by cutting them off from the surface. In the super apron design the netting is cut so as to virtually eliminate canopies and reduce the volume of the backdown area.

The second item of interest was "sleeping behavior". This behavior, coupled with the non-super apron types of nets, results in substantial numbers of animals being left in the net after backdown. After backdown, the net reopens and the porpoise become difficult to catch until they are sacked up with the fish. Such a situation results in high mortality on the porpoise, due to being confined, in the extreme, with several tons of fish.

A third item related to steps to be taken in tuna-porpoise mortality reduction research is the following. Given that all boats are properly equipped and have well-trained crews aboard, the mortality rate should decline to the point where all populations will be able to return to approximately a pre-fishing level. Assuming that this is so, the next step should be to develop a fishing method that does not rely on encircling porpoise with a purse seine.

Another area requiring research is how unexploited porpoise respond to purse-seines. Both the stocks outside the CYRA and those south of the equator have higher mortality rates than those in the traditional fishing areas. The behavioral basis for the difference in mortality should be investigated with an eye toward possible modifications that would solve the problem.

A final item meriting further research is to determine how one might remove porpoise from the net prior to backdown. It seems reasonable to expect that the longer a porpoise is confined in the net the larger its chances are of being killed. Thus if simple, practical, and reliable methods of prebackdown removal can be developed they would be valuable, at least in situations where an equipment breakdown has occurred which may occasionally take several hours to repair.

Avoidance of objects in the water is a very frequently observed behavior of porpoise which makes them herdable. Their behavior in the net and particularly their location in the net may result from a process in which they attempt to minimize incoming signals. Thus, they end up in center net or slightly more toward the far edge of the net as the boat is presumably a better sonar target and also generates much more noise than the net. With this hypothesis as the basis for design of a system, it may be possible to design a herding and release method for the porpoise that would not affect the tuna.

U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, La Jolla, Calif.

CRUISE REPORT (GEAR RESEARCH)

Vessel and Equipment

Chartered tuna purse seiner M/V *Elizabeth* C.J. (Nicholas L. Lavalouis, Master; Manuel Jorge, Fish Captain; Joe Jorge, Alternate Fish Captain). NMFS Cruise No. 208, Contract No. 03-6-208-35483. The vessel is 252 feet long with a 42-foot beam and a draft of 21 feet. She can carry up to 1700 tons of frozen tuna in 10 pairs of brine wells. Propulsion is provided by a twin screw system with two 2800 horsepower main engines giving a top cruising speed of 18 knots and a 400 horsepower bowthruster aids in maneuverability. The net used during the cruise was 700 fathoms long by 13 standard 4-¼″ mesh strips deep. The experimental "super apron" and double-depth safety panel of 1-¼″ mesh webbing (Fig. 1) were installed in the backdown area of the net.

Cruise Period

October 7, 1976 to December 9, 1976.

Area of Operation

Yellowfin tuna fishing grounds off Mexico and Central America within the Inter-American Tropical Tuna Commission's regulatory area (CYRA).

Purpose of Charter

To test a modification of the "Bold Contender" system, termed the "super apron" and to develop techniques for its efficient use in reducing incidental porpoise mortality during commercial tuna purse-seining operations. This work to be performed in partial conjunction with tuna-porpoise behavioral studies during a portion of the same cruise period.

Objectives

1. To evaluate the effectiveness of the "super apron" modification of the "Bold Contender" system in reducing incidental porpoise mortality.
2. To adjust flotation and deployment techniques during backdown to reduce the incidence of a prematurely submerged corkline and the resultant accidental loss of fish.
3. To adjust flotation and apron structure to permit controlled sinking of the backdown apex.
4. To conduct further tests of the use of a small, one-man inflatable raft to assist in porpoise removal during and after backdown.

Results

During the cruise 30,233 porpoise were captured and 915.5 tons of yellowfin tuna were taken in 45 net sets on yellowfin tuna associated with porpoise. One set was a water set and two sets were made on tuna associated with floating objects (logs) in which 90 tons of yellowfin and 5 tons of skipjack tuna were landed. Table 1 presents a summary of the catch and kill data for the behavioral research and gear research sets. Table 2 presents the date, location, catch, kill and raft-use statistics by set with subtotals for the gear and behavioral sets.

Porpoise mortality occurred on only five of the 45 sets made on tuna-porpoise-associated schools. Sixteen porpoises were killed on these five sets, four during the course of regular fishing operations and 12 during the activities of the scientific party. Excluding mortality during scientific activity, the mortality rates were 0.09 per set, 0.004 per ton of yellowfin caught in association with porpoise and 0.013% of the porpoise captured.

Fourteen net sets were made for the purpose of studying porpoise behavior in detail. As many as three skiffs and six divers were inside the net prior to and during backdown. In three of these sets (numbers 4, 5, 12) the presence of the divers and tagging efforts during backdown hampered porpoise release and resulted in 12 of the 16 deaths. The remaining four deaths occurred during backdown in two gear experimental sets that had no operational malfunctions. The animals became folded into the side of the backdown channel at a depth that precluded hand rescue.

The extremely low porpoise mortality rate experienced during this cruise is the result of the fishing captain and crew members' care and efficiency in setting and hauling their net, using speedboats to adjust the corkline (18 sets) and in backing down until all live porpoise were released (42 of 45 sets). These efforts in conjunction with the "super apron" and double-depth safety panel of 1-¼" stretch-mesh webbing have allowed this vessel to achieve a record low kill rate.

The "super apron"

The apron-type appendage to the backdown area of purse seine nets was first tried on an NMFS-chartered vessel in the fall of 1974 and subsequently led to the development and successful testing of the apron-chute complex known as the "Bold Contender" system. 1 year later. It includes a porpoise safety panel of 1-¼" mesh webbing 12 fathoms deep and 180 fathoms long. A 10-vessel mass test of the "Bold Contender" system in 1976 resulted in mortality rates substantially below the 1976 fleet averages for vessels using conventional nets, i.e., 2" stretch mesh in the safety panel. However, the mass testing revealed two generally recognized problems with its use. First, the smaller mesh size of the safety panel and apron-chute complex caused considerably greater drag when being pulled through the water during backdown than did the normal 2" safety panel. This caused the corkline perimeter of the backdown channel to submerge in the early stages of backdown. thus increasing the danger of loss of fish and necessitating a slower-than-normal backdown. Secondly, several vessels reported that the inability to sink the corkline at the apex of the backdown channel in the later stages of the procedure caused greatly increased need for hand rescue and longer backdown times.

To alleviate these problems the two-stage taper employed in the "Bold Contender" system (five mesh. two bar on the apron and one mesh, two bar on the chute) was changed to all five mesh. two bar. This straight taper allowed more even distribution of the downward pull on the corkline as backdown proceeded. Although the corklines did tend to sink slightly in the early stages of backdown. and backdown still had to begin slowly, no fish were lost at this stage during the charter and it was generally agreed that there was no problem.

With the "super apron" modification. the topmost strip of 1-¼" webbing (designated as the chute in the "Bold Contender" system) is approximately 200 meshes shallower at the backdown apex than its predecessor. The fish captain was able to sink the backdown apex to release the porpoise at will during all stages of the procedure. The re-surfacing of the corkline after sinking was probably slightly slower than for nets with the 2" porpoise safety panel. Two or three speedboats were deployed at the backdown channel apex on every set to help prevent accidental fish loss and to hand-release porpoise as needed. The chief scientist estimated that approximately 18 tons of tuna were accidentally backed out of the net during porpoise release in the 45 porpoise sets during the cruise. In general, the fish captain and the alternate fish captain were pleased with the porpoise-saving characteristics of the "super apron."

Observations from the inflatable raft during backdown on the charter of the M/V *Bold Contender* (fall 1975) showed that spotted porpoise sometimes become passive and pile up on the bottom of the backdown channel where they can be mistaken for dead. The removal of the extra webbing in the chute (discussed above) eliminated the two-step shelf formed with the "Bold Contender" system. Thus, as backdown proceeded with the "super apron," the channel became progressively shallower and ramp-like, raising the "passive" spotters up and flushing them out of the net. This reduced the necessity for hand rescue considerably. Of the 146 animals hand-released from the raft during backdown, the rescuer was quite certain that most of them would have been backed out anyway. No porpoise were killed in the six porpoise sets for which the raft was not used.

The use of the "super apron" atop the small-mesh, double-depth safety panel is not without operational faults, primarily because of the increased drag of the small mesh as it is moved through the water or as it is held against a current. In each of the porpoise sets which caught 50 tons of tuna or more the corkline tended to sink after backdown in the area just outboard of the third bow bunch. Though only a few tons of tuna were lost in porpoise sets, approximately 35 tons were lost in set 36 (schoolfish on a log) in this area. Underwater observation of the net in that area showed that as the net is hauled in after backdown the small mesh squeezes the entrapped water against the bunches which act as a dam. The blocked water forces the small mesh outboard of the third bow bunch to canopy out and when stretched to its limit the corkline begins to sink. The faster the net was rolled the more rapidly water had to be squeezed out and the deeper the corkline sank. It was found that this kind of sinking could be easily alleviated by release of the third and second bunches slightly earlier than normal. With large catches (>50 tons) it may be necessary to roll the net aboard a little more slowly.

On set 33, schoolfish with a log, a very strong surface current and an oblique subsurface current caused the entire area of small mesh from the second bow bunch to mid-net to sink and stay down until the purse rings were brought up out of the deep current. The surface current moved the log and almost all of the fish over the sunken corkline. It was not possible to judge the degree to which the small mesh was responsible for the sinking but it surely contributed to it. To avoid this problem in areas of strong currents, the captain must note the current direction and position all sets to avoid pursing the small mesh area of his net against the current.

As with the "Bold Contender" system there is a tendency for the center of the "super apron" to fold into or out of the net in some sets. On 15 sets a speedboat was used without incident to open or adjust the backdown apex prior to backdown. No maintenance was required on the small mesh during the cruise and only a few broken meshes and shark holes were seen by the underwater observer.

Inflatable Raft

During 39 of 45 porpoise sets a small inflatable raft was used as an observation-and-rescue platform by one of the scientists. A mask and snorkel was employed. The raft man signaled the captain when the backdown release area was clear of fish. In addition, he assisted in the removal of the last few porpoise in the late stages of backdown. Generally, backdown was continued until the raftman signaled that all porpoise including the "passive" spotters (see above) had been released. In checking to see if all live porpoise were out of the net it was discovered that the raft man could hear vocalizations of porpoise that were still in the net but could not be seen. This final listening check became common practice and several animals were saved as a result. The raft was also used during backdown to herd the porpoise toward the release area. This seemed to work well but only if the raft stayed more than about 10 meters from the nearest animals. When some groups of porpoise (10–100) would refuse to go over the corkline during backdown the raft man would wait until they were congregated near the sunken corkline and then paddle straight at them making as much commotion as possible. The initial avoidance response of the nearest animals often started them over the corkline and backdown would proceed to completion.

In four sets with expected large catches of fish the raft was used to attach up to four flotation balloons to the corkline along the sides of the backdown apex to lessen the chance of fish loss if all of the fish happened to move into the apex at one time. This was probably a good safeguard but it was never really tested with a large catch. After backdown the balloons were collected in the raft to facilitate net retrieval.

Summary

The record low mortality rate experienced on the charter cruise is the result of the concurrent evolution of improved fishing techniques and gear modifications developed by NMFS and the tuna industry and increased awareness of the captain and crew of the necessity to reduce incidental porpoise mortality. The following general list summarizes the activities which allowed the low mortality rate.

1. Set positioning to minimize negative effects of wind and current.
2. Early recognition of potential net collapse areas and use of speedboat(s) to prevent collapse.
3. Use of speedboats to herd porpoise out of potential danger areas.
4. Use of speedboats to adjust backdown area corkline prior to backdown.
5. Consistent use of two or three speedboats at backdown apex to prevent fish loss and to rescue porpoise.
6. Consistent backing down until all live porpoise are out of the net (very important).

7. Use of person in inflatable raft to: (a) signal when backdown apex is clear of fish, (b) herd and hold the porpoise in the backdown apex, (c) determine by using a mask and snorkel and by listening, when all live porpoise are out of the net, (d) hand-releasing animals.
8. Incorporation of small-mesh, double-depth safety panel.
9. Incorporation of "super-apron."

Personnel

James M. Coe, Chief Scientist (gear research), SWFC Philippe Vergne, Porpoise Rescue Foundation

Prepared by James Coe, Chief Scientist, and Philippe Vergne, Porpoise Rescue Foundation, Jan. 17, 1977.

Approved by Tzadore Barrett, Acting Center Director, and Frank Alverson, Manager, Porpoise Rescue Foundation, Jan. 17, 1977.

Table 2 Set Data

Set no.	Exp. set no.	Date	Latitude (N)	Longitude (W)	Average crew est. of porp. caught	% spin. in porp. caught	*Tons YF	Speed-boats used to tow	Elapsed back-down time (mins.)	# Raft rescued during back-down	# Porp. live in net after back-down	# Raft rescued after back-down	Spotter killed	Eastern spinner killed	White-belly spinner killed	Other killed	Total killed
1		10-14	10°32'	113°55'	533	-	45	0	20	3	0	0	0	0	0	0	0
2		10-14	12°27'	113°52'	825	-	35	1	0	2	0	0	0	0	0	0	0
3	1	10-16	11°19'	113°02'	water set	-	0										
4	2	10-17	10°33'	109°25'	1350	13	65	0	16	5	1	1	6	1	0	0	7
5	3	10-18	11°15'	109°25'	930	3	25	0	20	0	0	0	1	0	0	0	1
6		10-19	10°45'	109°00'	275	-	12	0	20	0	0	0	0	0	0	0	0
7	9	10-20	10°25'	102°32'	350	1	15	0	9	1	0	0	0	0	0	0	0
8		10-20	10°22'	100°49'	975	20	25	0	13	0	0	0	0	0	0	0	0
9		10-23	10°52'	107°42'	175	-	5	0	14	0	0	0	0	0	0	0	0
10	6	10-25	9°33'	104°45'	213	-	10	0	25	0	0	0	0	0	0	0	0
11	7	10-26	9°14'	105°16'	1056	10	70	0	19	8	0	0	0	0	0	0	0
12	8	10-27	9°21'	105°39'	133	-	18	2	5	3	0	0	4	0	0	0	4
13	4	10-27	9°40'	105°47'	1033	17	65	2	10	5	0	0	0	0	0	0	0
14	5	10-28	9°45'	105°03'	300	-	8	0	11	3	0	0	0	0	0	0	0
15	10	10-29	9°41'	104°37'	1000	12	53	0	11	2	0	0	0	0	0	0	0
16		10-30	9°41'	104°40'	125	-	15	0	11	3	0	0	0	0	0	0	0
17	11	10-31	9°37'	107°22'	50	-	4	2	10	4	1	1	0	0	0	0	0
18	12	10-31	9°46'	107°54'	625	45	6	2	8	3	0	0	0	0	0	0	0
19	13	11-1	10°15'	107°52'	816	1	8	1	6	0	0	0	0	0	0	0	0
20		11-1	10°43'	109°06'	1066	6	30	1	17	0	0	0	0	0	0	0	0
21	14	11-2	10°40'	[illegible]	283	-	8	1	3	4	0	0	0	0	0	0	0
22		11-2	11°27'	[illegible]	700	-	8	0	23	2	4	3	0	0	0	1	1
23		11-4	10°21'	113°23'	265	78	10	1	16	5	0	0	0	0	0	0	0
24		11-4	12°34'	113°54'	933	5	60	0	7	5	0	0	0	0	0	0	0
25		11-5	10°40'	113°30'	1033	13	20	1	15	7	0	0	0	0	0	0	0
26		11-5	10°23'	113°30'	683	15	[illegible]	1	20	0	0	0	0	0	0	0	0
27		11-9	13°53'	104°21'	533	-	10	0	11	5	0	0	0	0	0	0	0
28		11-11	13°58'	101°35'	833	-	12	0	15	10	0	0	0	0	0	0	0
29		11-11	14°14'	101°34'	603	0	9	1	13	5	0	0	0	0	0	0	0
30	15	11-12	13°43'	101°39'	333	0	4	0	15	3	0	0	0	0	0	0	0
31		11-12	13°34'	101°28'	55	0	0	0	6	1	0	0	0	0	0	0	0
32		11-13	12°20'	102°51'	700	0	4	0	12	5	0	0	0	0	0	0	0
33		11-15	9°15'	100°18'	Sch. F	-	0										
34		11-16	9°20'	99°20'	200	-	45	1	13	4	0	0	0	0	0	0	0
35		11-16	9°28'	99°03'	433	-	12	1	8	2	0	0	0	0	0	0	0
36		11-18	10°15'	98°09'	Sch. F	-	90										
37		11-19	10°01'	97°31'	35	-	25	1	8	1	0	0	0	0	0	0	0
38		11-19	9°35'	97°15'	316	-	14	0	10	3	0	0	0	0	0	0	0
39		11-20	9°18'	97°50'	105	-	10	0	6	2	0	0	0	0	0	0	0
40		11-21	9°27'	97°45'	1400	-	35	1	12	3	0	0	0	0	0	0	0
41		11-21	9°42'	97°44'	256	-	16	1	13	0	0	0	0	0	0	0	0
42		11-21	9°45'	97°54'	300	-	7	1	12	2	0	0	0	0	0	0	0
43		11-23	15°30'	101°27'	1233	65	12	0	16	15	0	0	1	2	0	0	3
44		11-26	15°28'	111°21'	800	-	15	0	17	5	0	0	0	0	0	0	0
45		11-27	12°21'	114°18'	233	5	10	0	24	7	0	0	0	0	0	0	0
46		12-2	10°52'	109°53'	2100	5	32	0	12	3	0	0	0	0	0	0	0
47		12-5	19°13'	[illegible]	550	-	25	0	15	4	0	0	0	0	0	0	0
48		12-6	13°55'	112°30'	1066	95	1.5	0	15	0	0	0	0	0	0	0	0
TOTAL (behavior sets)					8592		361	10	130 (Avg. 12.86)	41	2	2	11	1	0	0	12
TOTAL (gear sets)					21,641		554.5	12	422 (Avg. 13.61)	105	4	3	1	2	0	1	4
TOTAL (all sets)					30,233		1005.5	22	602 (Avg. 13.30)	146	6	5	12	3	0	1	16

Tonnages are estimates made at time of set, not actual unloading weights.

Table 1. Data Summary

No. of sets	Reason segregated	Tons tuna	Porpoise caught	Porpoise mortality	Kill/ton	Kill/set	% of captured porpoise killed
15	Behavioral experiment	361.0	8,592	12	0.03	0.80	0.13
26	Gear-experimental sets without gear malfunction	492.5	19,512	4	0.008	0.15	0.02
5	Gear-experimental sets with gear malfunction	62.0	2,129	0	0	0	0
2	Schoolfish sets	95.0	-	-	-	-	-
Total 48		1010.5	30,233				

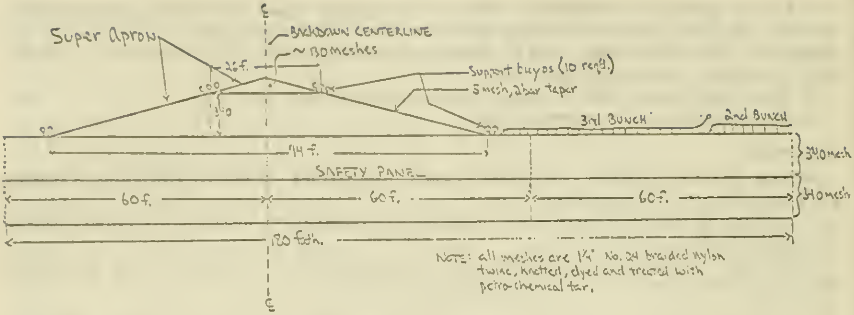

Super Apron
BACKDOWN CENTERLINE
~ 30 meshes
26 f.
Support buoys (10 req'd.)
5 mesh, 2 bar taper
3rd BUNCH
2nd BUNCH
14 f.
SAFETY PANEL
30 mesh
40 mesh
60 f.
60 f.
60 f.
180 fath.
NOTE: all meshes are 1¼" No. 24 braided nylon twine, knotted, dyed and treated with petro-chemical tar.

Figure 1. "Super Apron" Modification of the "Bold Contender" System, December 16, 1976 Assembly Diagram (vertical distances not to scale)

Mr. LEGGETT. It is my understanding that the law gives the Maritime Administration discretion to rule on vessels over 3,000 tons. It would also be my impression that there are not many tuna vessels under 3,000 tons that we are really concerned with.

So I would say that MarAd does have concern over all the ships that are involved in this industry.

It also appeared to me, and I think others, that were a large number of vessels transferred, an environmental impact statement might be required.

So we can also take a side glance at the fact that merely because American boats do not fish for tuna in a purse seine method, does not mean that not even larger numbers of porpoises are not taken incidental to other fleets fishing.

That is one of the things that we want to address ourselves to, as I understand it, counsel has provided me with a note indicating that the average backdown on 30,000 tons of tuna required by the *Elizabeth C.J.*, the backdown period was 13.38 minutes.

Now, we do not know what to compare that to. Do you know what the average backdown period is on the average tuna boat?

I would expect it would vary with the number of porpoises encircled by the vessel, and other things.

Dr. CHAPMAN. I am sure that is correct, Mr. Chairman. I believe there will be witnesses here from the industry who, I am certain, can speak to that question very well.

You may want to direct that question to some of those witnesses later today.

Mr. LEGGETT. Mr. Eisenbud?

Mr. EISENBUD. I do not have any information on that question, Mr. Chairman, but I would like to indicate that it is my hope that we have only just begun on this analysis of the results of this cruise. A great deal of information has been gathered and will be analysed by Commission contractors and others. I think we all look forward to that analysis and application of the promising results of the research as the film, data, and reports are reviewed and evaluated.

Part of that effort will be undertaken at the workshop which will be convened at the end of this month. Although it may be premature at this point to draw conclusions, it seems to us that there are a number of promising results from the *Elizabeth C.J.* cruise which are worth pursuing.

Mr. LEGGETT. It is my understanding that you scheduled calls for the showing of the footage that was collected on that behavioral excursion at 1:45 today, 15 minutes of footage, I would ask, did the Commission participate in the collection of that footage, or the clipping of it.

Mr. EISENBUD. Mr. Chairman, I have reviewed the footage of the *Elizabeth C.J.* cruise on behalf of the Commission. The film that will be shown this afternoon, if I am not mistaken, is a product of the American Tunaboat Association. It is a documentary which was produced by the American Tunaboat Association. It contains some footage from the research cruise but it also contains footage which was not taken on the *Elizabeth C.J.* more than just the footage of the *Elizabeth C.J.*

Mr. LEGGETT. I see.

Mr. EISENBUD. The total footage taken aboard the *Elizabeth C.J.* is 8,000 feet, and is being reviewed now for purposes of identifying potential trade secrets. It will be made available to the public pursuant to applicable law and the agreement between the Government, the American Tunaboat Association, and the vessel owner which we discussed with you earlier last year.

Mr. LEGGETT. Is that the full 8,000 feet, or will that be doctored or clipped?

Mr. EISENBUD. Certain portions may be withheld from public disclosure, if they are determined to be trade secrets or otherwise exempt under law. At the present time, however, it appears that there is only a small portion of the total film that may involve trade secrets. That portion will be reviewed within the next few days and, if it is exempt, it will be protected. The remainder will be available to the public, as we discussed some time ago.

Mr. LEGGETT. If there happens to be a secret on how not to kill porpoises, I hope it will be widely distributed.

Mr. EISENBUD. I can assume that it will be.

Mr. LEGGETT. Mr. Oberstar?

Mr. OBERSTAR. I would just like to come back to this question of optimum porpoise population, whether the Commission has made any progress since our hearings of last year, reaching an estimate on which to guide the committee, industry, and the Court, in dealing with the '72 law?

Dr. CHAPMAN. Mr. Oberstar, as Dr. Fox stated, there was a workshop in La Jolla in July of 1976, at which I participated on behalf of the Commission.

Subsequently there has been further study with respect to the whole question of optimum sustainable population, by and on behalf of the Commission. The Commission has indicated its position with respect to the eastern spinner porpoise population. We believe that the population is below the 60 percent level, when compared to the original stock size, and therefore should be designated as "depleted" under the act.

I would like to clarify our position. The act refers to any taking with respect to specific stocks, and that admonition of the act was taken into account by the National Marine Fisheries Service in the proposed regulation that were published in the Federal Register last year.

Mr. Eisenbud. Forgive me for interrupting, please, but we may be treading in the area that the Service, and I think rightly, sought to avoid. I fear that we may be inadvertently getting into a discussion of the regulations. I would like to express some concern about such a discussion in light of the fact that it is a pending adjudication.

I certainly do not want to cut you off, but I do have some reservations about how far we should go into it.

Mr. Oberstar. I am trying to understand what the difficulties are in making this assessment of the population, because it is essential to legislating in this area, to carry out the mandate of the law.

What problems do you find in assessing optimum population for porpoises and dolphins? What are your problems in measuring that population, and establishing a benchmark against which to measure any increase or decrease?

Now, you made a statement that the eastern spinner dolphin is 60 percent below the population level. Our problem was we did not have accurate measurements years back so, 60 percent below what?

Mr. Leggett. That is what I am trying to determine.

Dr. Chapman. The workshop in La Jolla did in fact make estimates of the original population levels and the 1976 levels of all the major species. These estimates are available in the workshop report, which was released in September of last year, and updated estimates were given by the National Marine Fisheries Service in their testimony to the administrative law judge in connection with the 1977 regulations. That is a matter of public record.

There are, of course, certain problems with those estimates. Those estimates were carefully reviewed, and concerns were expressed in the course of the hearings. The estimates are based on a number of assumptions, and a number of the estimates involve certain statistical problems which were reviewed fully, both in the workshop report and subsequently.

One of the problems is that the best base for the estimation is an aerial survey which was carried out in 1974. It was not a complete survey, and it was not intended to be. It was intended to be a feasibility study, but unfortunately no further information was derived since that time.

It was the recommendation of the Commission that another aerial survey be carried out, and this recommendation was adopted by the National Marine Fisheries Service which is now carrying out another survey.

The more comprehensive survey was initiated in January of this year, and obviously will not be completed prior to March. The results will not be analyzed for sometime thereafter. Considerably better information, I hope, will be available at that time. The data base is, admittedly, weak but it is the best we have.

Mr. Oberstar. And probably always will be because of the enormity of the area we are dealing with, we are talking about several miles of ocean, and there is no way, really, of getting down and counting heads, as we can do with timber wolves.

Mr. Leggett. Let us keep the timber wolves out of it.

Mr. Oberstar. Well, I know we want to bring them in, too. It is just a difficult problem to measure the population.

Dr. CHAPMAN. It is a very difficult problem, but there are scientific ways of approaching it.

Mr. OBERSTAR. Do you think you are getting a handle on it?

Dr. CHAPMAN. Yes, sir, considerable progress has been made.

Mr. OBERSTAR. It just leaves this committee in a situation of legislating almost in a vacuum on inaccurate figures based on statements made by assumption on very unscientific, questionable population figures.

Mr. EISENBUD. Mr. Oberstar, if I might offer a comment from my perspective, that is probably always, from what I can gather, the case with estimating wildlife populations. There are, however, standard estimating techniques that are being used, and have been used, and, I take it, are being improved upon.

I would like to refer you to the paper that was presented on behalf of the Commission to the Bergen Conference. I think we sent you a copy, but we will be happy to provide another copy to you. That paper outlines some of the approaches that the Commission thinks can be used for the purpose of reviewing OSP, and those approaches are, in turn, being refined again under some further contract efforts that we have undertaken, and also in the course of the administrative hearings.

Mr. OBERSTAR. I would like to have this paper. I do not recall receiving it.

Mr. EISENBUD. I will make sure you will get one, sir.

Mr. OBERSTAR. In our hearings last year we encouraged the Commission to improve and intensify its efforts in doing population counts, so we would have a better data base on which to work for legislative process.

I have no further questions.

Mr. LEGGETT. Mr. Mannina?

Mr. MANNINA. Dr. Chapman, do you believe it would be possible and useful to expand and upgrade the training for skippers and crewmembers in the U.S. tuna fleet?

Dr. CHAPMAN. Yes; I think it would be possible and useful. That is one of the proposals that have been made with respect to the dedicated vessel.

Mr. MANNINA. Do you also believe it would be constructive to expand the use of the super apron?

Dr. CHAPMAN. Yes; I think it would be.

Mr. MANNINA. Finally, I believe, on page 76 of the administrative law judge decision, it was found that the eastern spinner was not depleted.

Could you comment on that?

Dr. CHAPMAN. The Marine Mammal Commission did submit an exception to that finding.

Mr. MANNINA. Could you submit your comments for the record?

Mr. EISENBUD. We will be happy to provide copies of the exception, Mr. Mannina.

Mr. LEGGETT. Mr. Spensley?

Mr. SPENSLEY. Just one question.

You mentioned you made a recommendation to the National Marine Fisheries Service. When did you make that recommendation to them?

Mr. Eisenbud. Let me provide the details for the record, it has been an ongoing discussion for at least a year now. I will have to look back to get the exact date.

[The following was submitted:]

United States Department of Commerce
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Washington, D.C.

In Re: Proposed Regulations to Govern the Taking of Marine Mammals, and Related Matters Incidental to Commercial Fishing Operations, Docket No. MMPAH No. 2-1976.

Exceptions of the Marine Mammal Commission

28 January 1977.

These Exceptions are submitted on behalf of the Marine Mammal Commission in response to the Recommended Decision of Administrative Law Judge Frank W. Vanderheyden and in accordance with Footnote 1 of that Decision

The Recommended Decision reflects a careful and skillful review of the law and facts in this complex, expedited proceeding. Those Exceptions which significantly affect the ultimate substantive decision in this proceeding and/or affect the course of future proceedings or actions under the Marine Mammal Protection Act are noted below with reference to the text of the Recommended Decision (ALJ) and the transcript (Tr) and exhibits (Exh) of this proceeding.

I. THE LOWER BOUND OF OPTIMUM SUSTAINABLE POPULATION

The Commission takes exception to the finding and/or conclusion that the lower bound of the optimum sustainable population is 50 percent of the unexploited population (ALJ 73). This aspect of the Recommended Decision is of vital importance not only to this proceeding but also, as a precedent, to the continuing effort to implement the goals of the Marine Mammal Protection Act in operational terms.

In discussing the finding that the lower bound of OSP is 50 percent of unexploited population levels, the Decision notes that Dr. Fox testified at greater length than any other witness on the issue of OSP and related matters and that his testimony was persuasive and convincing (ALJ 73). The Commission takes exception to this reliance upon the testimony of Dr. Fox, not as the Decision suggests (ALJ 73), because it is based on a purely biologically point of view, but rather because it is based exclusively upon the testimony of Dr. Fox which is unsupported by or contrary to the testimony of all other expert witnesses and the weight of the evidence which was adduced in the course of their testimony and the cross-examination of Dr. Fox. The evidence in support of the 50 percent rather than the 60 percent level is so uncertain and unpersuasive that the choice of the 50 percent level is arbitrary. It is the selection of an arbitrary approach to the issue in the face of uncertainty that is legally unacceptable in light of the clear policy and requirements of the Act that marine mammals come first and that their protection be assured. Selection of an arbitrary 50 percent figure for the lower bound of OSP in the face of uncertainty and persuasive evidence that the level is more appropriately set at 60 percent does serve to provide an appealingly simple approach and resolves difficulties which might otherwise be encountered in accommodating competing interests of the tuna industry. But the choice of one rather than another level for this purpose is precisely the type of "balancing act" that is proscribed by the Courts. *Committee for Humane Legislation, Inc.* v *Richardson*, 414 F. Supp. 297 (D.D.C. 1976); ALJ 20-21.

A. *The Range of 30-70 Percent for the Lower Bound of OSP is Unsupported*

As the Decision notes, Dr. Fox differed with the other participants in the La Jolla Workshop in his view that the lower bound of OSP should be 30-70 percent of unexploited population levels; the Workshop Report considered the range of the lower level of OSP to be 50-70 percent and several participants felt that the minimum lower bound should be 60 percent of unexploited levels (Workshop Report, p. 7, fn 3) and so testified, as discussed below. Dr. Fox and the Administrative Law Judge base their selection of the 50 percent level, in part, on the fact that it is the central value in the 30-70 percent range (Exh 7, p. 8; ALJ 71, 73) and the validity of this selection is therefore dependent upon the inclusion of the 30, 40, and 50 percent values within this range.

1. *The 30 Percent Figure is Unsupported.*—The validity of the 30 percent figure is persuasively challenged by Dr. Chapman on the basis that the only paper providing support for the figure (Exh 22) contains assumptions which are without foundation with respect to the data and do not have any basis by comparison with the biology of other marine mammals, and that the parameters give a sustained harvest from all age groups of 51 percent of the population which is absurd and must result from basic errors in the assumptions or calculations (Exh 21, P. 10; Tr 962-63). Dr. Chapman also testified that if another questionable assumption of the paper were reversed, as is more reasonable, the lower level for the subject population would be 68 percent of unexploited levels (Exh 21, P. 11).

In response to cross-examination, Dr. Fox testified that he did not know whether or not the basic assumption of the paper upon which he relied for the 30 percent figure—that the mortality rate is the same for immature animals as for mature animals—was true (Tr 420). He testified that he is aware of a number of marine mammal populations for which this is not true, admitted that he was not familiar with the work of other harp seal investigators challenging the assumption, and that he "merely looked at the individual paper" (Tr 421). Dr. Fox could not express a view as to whether the sustained harvest of 51 percent of all ages was reasonable, since he had not studied the paper as a whole very carefully (Tr 423). He also testified that he knew of no other scientific study that suggests a 30 percent level for a marine mammal population (Tr 427) and noted that porpoises are cetaceans and that all of the data of which he is aware suggest a level that is higher than 30 percent for cetaceans (Tr 428).

Despite these obvious weaknesses in the basis for the 30 percent figure, both Dr. Fox and the Decision include it as a valid figure in the range of estimates for the lower level of OSP. Indeed, Dr. Fox testified that he weighted it equally with the 70 percent figure, even though there were substantial data supporting the higher figures (Tr 426-27). The record provides no support for the 30 percent figure and it must be discounted entirely and removed from consideration in determining the lower level of OSP.

2. *There is Virtually No Support for the 40 Percent Figure.*—The record is absolutely devoid of any substantive discussion or evidence indicating that the lower level of OSP might be as low as 40 percent of unexploited levels. It too, therefore, must be removed from the range of estimates of the lower level of OSP.

3. *The 50 Percent Figure is only Weakly Supported and Speculative.*—Dr. Fox stated that the 50 percent figure is supported by the only data from a porpoise population (Exh 7, p. 8). Upon cross-examination concerning these data, contained in a paper dealing with a Japanese population of porpoises (Exh 41), Dr. Fox indicated that the basic assumption that the population is in equilibrium is not valid (Tr 613). He testified that he did not calculate the points to determine whether they were correctly utilized in the graph upon which he relied because he did not realize that the calculations were based upon an assumption of equilibrium (Tr. 615-16). He further testified that he did not know the effect that this assumption and errors in the calculations or graph would have on the conclusion that the lower level is 50 percent (Tr 616) but stated that, if the points in the graph were not correct, then the best relationship may not be linear and may not be 50 percent (Tr 618). The expert testimony of other witnesses, discussed below, suggests that the relationship may well not be linear (Exh 21, 28, 29) and that, absent reliable data and analyses to support it, the 50 percent is speculative, at best.

B. *The Lower Bound of OSP Should be Set at 60 Percent*

As suggested above, the 30, 40, and 50 percent figures are not supported by any acceptable data or analyses in the record which warrant their consideration in any range of estimates for the lower level of OSP. The selection of 50 percent as the central value of the range, as suggested by Dr. Fox (Exh 7, p. 8), is therefore inappropriate because 50 percent is, at best, the lowest level in the range. Selection of the central value would therefore give at least 60 percent for the lower bound. Moreover, the support for the 50 percent figure is so uncertain that it should not be given serious consideration.

Dr. Fox admits, on cross-examination, that the use of the range of estimates is not the real basis for selection of the 50 percent level. He testified that he found no basis for selecting a level so he chose the *simplest* model which gives the 50 percent figure (Tr 426). The selection of this value, for which there is no acceptable support in the record, and its adoption in the Decision is objectionable because it ignores the substantial evidence that was adduced in support of the 60 percent value. That evidence is set forth in the testimony of Dr. Chapman (Exh 21, p. 10-12; Tr 960-75). The uncontroverted evidence indicates that the lower bound of OSP for cetaceans is at least 60 percent of unexploited levels. For the blue whales, the lower bound of OSP occurs at 67.5 percent; for the fin whales in the Antarctic, it occurs at 80 percent of unexploited levels (Exh 23a). These estimates, unlike the weak support for the 50 percent figure, are based upon an analysis of data and are not critically dependent upon untested assumptions (Exh 21, p. 11). These and other studies, as well as the clear need to be conservative in the face of uncertainties, led both Dr. Chapman and Dr. Aron to testify that the lower bound of OSP not be less than 60 percent of unexploited levels (Exh 21, p. 12; Exh 81; Tr 960-75, 3015-18).

II. DEPLETION

Based upon the preceding discussion which leads to the finding that the lower bound of OSP should be set at 60 percent, the Eastern spinner population, at 52-54 percent of unexploited levels (ALJ 75), is depleted, and the Commission therefore takes exception to the discussion of depletion in the Recommended Decision and the finding that the Eastern spinner population is not depleted (ALJ 76).

1. *The Sibenius Analysis.*—Even assuming *arguendo* that 50 percent rather than 60 percent were the lower bound of OSP, the analysis by Mr. Sibenius (Exh 18) requires a finding that the Eastern spinner population is depleted.

The Recommended Decision discussed the conclusion of the Sibenius analysis and notes that, if anything, it probably underestimates the likelihood of depletion (ALJ 74). Having noted it, however, the Decision then ignores it entirely. The Sibenius analysis cannot be ignored and, as noted by Dr. Chapman, provides an alternative approach which requires that the Eastern spinner population be treated as depleted. Dr. Fox, when asked on cross-examination if the Sibenius analysis suggested that the Eastern spinner population is depleted even if the lower bound of OSP is 50 percent, said that he did not understand it that way (Tr 432-437). Dr. Fox and the Administrative Law Judge apparently misunderstood the import of the Sibenius analysis. Mr. Sibenius, an expert in probablistic analysis, testified that there is a 60.5 percent likelihood that the Eastern spinner population is depleted, regardless of where the lower bound is set within the 50-70 percent range, using 1976 data for Eastern spinner population size, and a 52.4 percent likelihood that it is depleted using the 1977 population figures (Tr 745). Mr. Sibenius stated that there is thus a better than 50 percent chance that the population is depleted so long as there is an equal chance of the lower bound falling anywhere between 50 and 70 percent (Tr 745). As noted above, there is reason to believe that the lower bound is substantially above the 50 percent figure and the likelihood of depletion would therefore increase (Tr 746).

2. *Depletion was not Considered by the Workshop.*—The Commission takes exception to the discussion on the bottom of page 74 and the top of page 75 of the Recommended Decision. Exhibits 9 and 9a, as well as the Workshop Report, indicate that biological depletion whatever that means, was not considered. Dr. Gulland, for example, states in his letter of 16 October (Exh 9) that errors and possible precise definitions of the lower end of OSP were not discussed at great length by the Workshop and that "below OSP, no catching" was not discussed in great detail. Similarly, Dr. Tomlinson states in his response that only a short time was spent discussing the lower bound of OSP and that no mention was made of the consequences of a finding that a population was below OSP (Exh 9).

Clearly, the fact that participants at the Workshop did not specifically address the question does not justify the statement that none of the participants at the Workshop considered any of the populations to be depleted. Obviously, both Dr. Chapman and Dr. Aron considered the Eastern spinner population to be depleted.

3. *Population Below OSP is Depleted.*—The Commission takes exception to the discussion at the top of page 75 of the Recommended Decision, to the extent that the Decision relies upon it. This discussion would, if taken seriously, make a mockery of management efforts. Obviously, estimates cannot be precise within one animal. But a line must be drawn somewhere if excessive taking is to be stopped. The Marine Mammal Protection Act says to draw that line at any one of three points under Section 3(1)(A), (B), or (C). This discussion would suggest that a population will not be depleted, even if it is below the 50 percent level which Dr. Fox suggested. That approach is clearly unacceptable under the Marine Mammal Protection Act as it is presently written. If the concern is addressed to the rigor of the prohibitions imposed upon a depleted population, then the appropriate course of action is to modify the prohibitions by legislative action. It is not, however, appropriate to conclude that it is impossible to determine whether or not a population is depleted.

III. QUOTAS

A. *Species or Stock Specific Quotas*

The Commission takes exception to the recommendations of the Administrative Law Judge with respect to species specific quotas to the extent that they are inconsistent with the recommendations set forth in its initial and reply briefs.

1. *Assumptions and Uncertainties.*—The fundamental and significant assumptions and uncertainties with respect to the available data are summarized by Dr. Chapman (Exh 21, p. 2-6). These uncertainties relate to the estimates of the historic kill by species, the present estimates of the kill, biases in the estimation of porpoise populations, school size estimates, area occupied by porpoises impacted in the purse seine fishery, and uncertainties in the net reproductive rates and the changes in these rates with exploitation. In the face of these uncertainties, decisions which may be to the disadvantage of the affected porpoises must be conservation (Tr 980).

Some confusion arises, in the context of establishing quotas based upon the various levels of confidence, because the Administrative Law Judge appears to believe that the computations leading to the various levels of permissible take at one or another level of confidence includes some statistical calculation of the likelihood that one or another of these uncertainties will be resolved in favor or against the porpoises. This, in fact, is not the case. The assumptions concerning the reproductive rates, the effects of serious injury, the effects of chase, the effects of age-sex selection, and other factors noted throughout the record are not quantified in statistical terms. The estimates of confidence that one or another level of take can occur and still allow the population to increase *assume* that the assumptions are correct. In order to *assure* that the affected populations will not be disadvantaged, the recommended levels of take set forth in the Commission's reply brief are the legally acceptable levels so as to account for some possibility that one or more of the assumptions will fail (Tr 976; Exh 29, p. 9).

2. *The Quota for Offshore Spotted Dolphins.*—The Commission's recommended quota of 34,203 offshore spotted dolphins utilized the available data and statistical techniques to compute a quota which effectively accounted for the uncertainty concerning the net reporductive rate of the offshore spotted population. The recommendation of the Administrative Law Judge does not account for this uncertainty.

3. *The Quota for Whitebelly Spinner Dolphins.*—As in the case of the offshore spotted dolphins, the Administrative Law Judge summarizes but does not express his reasons for rejecting the Commission's recommendation with respect to this quota. A total U.S. kill of 7,835 animals, as recommended by the Commission, would not pose a threat of depletion to this population but would slow the decline which will occur as a result of the taking recommended by the Administrative Law Judge. Contrary to the statement on page 83 of the Rec-

ommended Decision, the Workshop Report does not indicate any recommendation with respect to the level of taking from this or any other population.

4. *The Quota for Eastern Spinner Dolphins.*—Based upon the preceding analysis, the Commission takes exception to the recommendation that a take of 6,587 Eastern spinner dolphins be permitted (ALJ 86-87). The Eastern spinner population should be treated as depleted and no regulations or permits should be issued to allow the intentional taking of Eastern spinner dolphins. The Commission recommended intentional taking of Eastern spinners be prohibited and the prohibition of fishing on Eastern spinners should apply to intentional fishing on pure *as well as mixed* schools.

5. *Mixed Schools.*—Consistent with the discussion of the Eastern spinner population above, the Commission takes exception to the recommendation on page 98 of the Recommended Decision to the extent that it would permit intentional setting on mixed schools which were known to contain Eastern spinner dolphins before the set was made. While the Commission agrees that there is some margin of error in identifying schools, the recommendation of the Administrative Law Judge does not appear to solve the problem. It will arise as soon as the quotas on species found in mixed schools are reached. Intentional setting on mixed schools containing coastal spotted dolphin, Costa Rican spinner dolphin, and Eastern spinner dolphin, as well as any pure schools other than offshore spotted and common dolphins, should be prohibited. Increased training and increased observer effort should be utilized to implement the ban with reference to a reasonable margin of good faith error as suggested by the Administrative Law Judge (ALJ 97).

B. *The Total Quota*

The Commission takes exception to the recommended total quota of 96,000 animals (ALJ 87) for the reasons set forth below.

1. *A Kill of 96,000 is Inconsistent with the Goal of the Act.*—The Recommended Decision recognizes the "well defined legal requirement that porpoise mortality is to be reduced" (ALJ 30). The finding that a quota of 96,000 satisfies this requirement (ALJ 87) is, however, erroneous with reference to the data which are available at this time. The Recommended Decision notes that the total U.S. kill in 1974 was 99,000 and that it was 134,000 in 1975 (ALJ 22). The 96,000 figure would be a reduction from the 1975 level of kill but only a slight reduction of 3,000 from the 1974 level of kill. No point estimate is available for the 1976 kill at this time. It is estimated to be between 84,000 and 112,500 (ALJ 22). The Administrative Law Judge apparently compares the 96,000 figure to the upper limit of the range of estimates—112,500—and therefore concludes that 96,000 will be a reduction. It could, however, represent an increase if the actual total kill in 1976 is closer to the lower bound of the range and it will be only slightly below the mid-point of the range—98,250. Moreover, the 96,000 figure exceeds the 30 percent reduction of the 1975 kill which was set by the National Marine Fisheries Service as a goal in the beginning of the 1976 season. It therefore represents a regression. In addition, the 96,000 figure exceeds the 78,000 quota which was set and presumably would have been enforced during the 1976 fishing season, had it not been for unsuccessful but dilatory delays resulting from challenges by certain fishermen. For this reason as well, the 96,000 figure is a repression rather than progress toward the goal of reducing incidental mortality and serious injury.

2. *A Lower Total Quota is Practicable.*—The 96,000 figure is in excess of the levels requested by tuna industry representatives. Mr. Kelly testified that only 85,000 was necessary (Tr 1967), as did Mr. Silva (Tr 2350) and Mr. Mulligan (Tr 2689). Mr. Alverson testified that a quota of 84,000-91,000 was necessary (Tr 2794-95).

In addition, the Administrative Law Judge found that a kill rate of 0.7 is attainable (ALJ 24). 111,000 short tons of yellowfish were taken on porpoise in 1975 by U.S. vessels in the Eastern tropical Pacific (ALJ Appendix A). Assuming a similar catch in 1976, a kill rate of .7 porpoise per ton of yellowfin taken on porpoise would result in a kill of 77,700, not 96,000.

IV. SUNDOWNERS AND RUBBER BOATS—FACE PLATES

As the Recommended Decision notes (ALJ 43), sundowners have the potential for high kill rates and, as indicated in Exhibit 31, it is not possible to discern the number or type of porpoises encircled, killed, or released in darkness. The Commission agrees that floodlights will help reduce mortality associated with sundowner sets but feels that such sets should be discouraged. Reduced visibility will increase the difficulty encountered in identifying Eastern spinner dolphins and will therefore increase the likelihood that they will be taken.

There is some confusion in the language of the Decision on page 43 concerning the use of speedboats and/or rafts. These should be used on all sets, whether or not backdown occurs in darkness. Similarly, there is some confusion concerning the use of face plates and rafts in the course of the discussion on page 44. These too, should be used on all sets, and not just sundowner sets. The benefits to be gained from the use of speedboats and/or rafts, and face plates and rafts accrue during daylight sets and should not be limited to sundowner sets.

V. SEVEN DAYS NOTICE

Although the Commission does not disagree with the suggestion that a three week notice period would lessen potential difficulaties or hardships which might be suffered by the industry, the selection of the three week duration for the notice period is entirely arbitrary. There is no evidence whatsoever in the record to support the choice of three weeks and the position of the expert agency in testimony and briefs is that its ability to develop accurate estimates and implement timely closure will be impaired by extension of the notice period to more than one week. The regulatory provision concerning notice should be that suggested by the agency. The notice period can be adjusted, by subsequent regulation, if it appears reasonable and feasible to extend it after a review of the observer program and other aspects influencing calculation of the closure.

CONCLUSION

For the reasons set forth above, the Commission recommends that the Recommended Decision of the Administrative Law Judge not be accepted, in its entirety, and that the National Marine Fisheries Service promulgate regulations consistent with these exceptions.

Respectfully submitted,

ROBERT EISENBUD, *General Counsel.*

U.S. DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
Rockville, Md., January 24, 1977.

Mr. JOHN R. TWISS, JR.,
Executive Director, Marine Mammal Commission, 1625 Eye St. NW., Suite 307, Washington, D.C.

DEAR MR. TWISS: This is in response to your letter of January 6, 1977, to Mr. Robert W. Schoning, Director, National Marine Fisheries Service, concerning the availability of Saltonstall-Kennedy funds for tuna/porpoise research.

Mr. Schoning referred the above matter to this office for review. We are preparing a request for an opinion from the Comptroller General of the United States as to whether Saltonstall-Kennedy funds may be used to support tuna/porpoise research in accordance with departmental requirements.

The Office of General Counsel will contact you as soon as an opinion is handed down.

Sincerely,

JAMES W. BRENNAN,
Deputy General Counsel.

MARINE MAMMAL COMMISSION,
Washington, D.C., January 6, 1977.

Mr. ROBERT W. SCHONING,
Director, National Marine Fisheries Service, NOAA/DOC, Washington, D.C.

DEAR BOB: I write, once again, concerning the availability of S-K funds for tuna-porpoise research, a subject first raised by the Commission in 1975. In my most recent letter of 14 September 1976, we recommended that a "formal ruling be sought from GAO on the issue and that our correspondence, particularly the attachment to the 27 July 1976 letter, be forwarded to GAO with your request."

I assume that GAO now has all of the material before it, and would be grateful if you would let me know when its decision is expected.

Sincerely,

JOHN R. TWISS, Jr.,
Executive Director.

MARINE MAMMAL COMMISSION,
Washington, D.C., September 14, 1976.

DR. ROBERT W. SCHONING,
Director, National Marine Fisheries Service, NOAA/DOC, Washington, D.C.

DEAR BOB: Thank you for your letter of 7 September 1976. It arrived on the 13th. The matter of the availability of Saltonstall-Kennedy funds for support of tuna-porpoise research efforts has been under discussion for about a year. I am concerned that you still base your decision not to pursue funding of tuna-porpoise research with Saltonstall-Kennedy funds upon the "preliminary assessment" of your General Counsel. We considered your views, as expressed in November 1975, to be preliminary. Based upon those views and the Commission's analysis of the situation as summarized in my letter of 27 July 1976, we do not feel it appropriate to still be speaking in terms of preliminary assessments. The information that we provided and such other information as has been available to your General Counsel should have been adequate to reach a final conclusion by this time. Since this has not been done, we recommend that a formal ruling be sought from G.A.O. on the issue and that our correspondence, particularly the attachment to the 27 July 1976 letter, be forwarded to G.A.O. with your request.

It was very useful for us to have the opportunity to develop a better understanding of exactly what your funding problems are given your levels of authorization. Your position appears difficult, and I hope that it may be possible for the Commission to help you. To this end, I have written Harvey Hutchings asking that we be provided a full review of your funding situation prior to the forthcoming hearings so that we may be able to be of constructive assistance in support of any requests which you may make during the hearings. My hope is that we may be able to help you significantly.

Thank you again for your letter. I hope that a final determination on whether any consideration can be given to the use of Saltonstall-Kennedy funds can be made promptly.

Sincerely,

JOHN R. TWISS, Jr.,
Executive Director.

U.S. DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
NATIONAL MARINE FISHERIES SERVICE,
Washington, D.C., September 7, 1976.

MR. JOHN R. TWISS, Jr.,
Executive Director, Marine Mammal Commission, 1625 Eye Street N.W., Washington, D.C.

DEAR JOHN: As requested in your letter of July 27, 1976, we have taken another look at the availability of Saltonstall-Kennedy (SK) funds to support the tuna-porpoise research efforts. Although we are most anxious to supplement funding for tuna-porpoise, we again must conclude that based upon the preliminary assessment of our General Counsel, we would be on shaky ground to pursue funding of tuna-porpoise research through SK. We will, however, continue to investigate the legality of using SK funds.

John, as you know, SK is only one source of funding open to NMFS. In addition to the regular appropriation route, it is possible to redirect funds within NMFS or seek NOAA funds to meet selected high priority needs. We currently are reviewing the entire tuna-porpoise and marine mammal research efforts to see if a part or all of the costs of the aerial survey can be accommodated within the present level of expenditure for tuna-porpoise research. If not, then we will examine the possibility of other sources of funding for this. We agree with you, particularly in view of the recent court decisions and the requirements for more extensive population data, that a full-scale aerial survey is of highest priority of our unfunded needs and must be undertaken as quickly as possible.

There is another factor that bears on this problem. We continuously have been reprogramming more funds into this program. Recently additional money has been provided to the Southwest Fisheries Center to accelerate and improve the analysis and ADP work at the Center. Within the past 3 months we have given the Southwest Region additional funds and positions to improve the support of the observer program. We also have provided additional funds for expanding the observer program by 10 trips.

As a result, we are now spending within about $250K of the total appropriation authority under the Act. Section 110 authorizes $1,667K and Section 114 authorizes $2,000K. Our expenditures, including the FY 1977 increase of $650K, will put us within $250K of the total authority of $3,667K. This is after a shift of whale research from the Marine Mammal Protection Act line item to the Endangered Species Act line item to accommodate further expenditures.

Further increases in expenditures are constrained until our authority is increased. We also have to consider the possibility of using the remaining limited funding authority for the aerial survey and for other critical needs cropping up as the situation changes.

At any rate, John, we appreciate the recommendation of the Commission concerning research priorities. We agree in principle and are trying to work around the legal and operational problems to effect your recommendation. I will inform you of our resolution of the funding problem as soon as a decision can be reached within NOAA.

Sincerely,

ROBERT W. SCHONING,
Director.

MARINE MAMMAL COMMISSION,
Washington, D.C., July 27, 1976.

Mr. ROBERT W. SCHONING,
Director, National Marine Fisheries Service, NOAA, Department of Commerce, Washington, D.C.

DEAR MR. SCHONING: I am writing with further reference to the availability of Saltonstall-Kennedy funds for support of research related to the tuna-porpoise problem.

As you know, the need for additional funding for support of tuna-porpoise research continues and, if anything, has grown more acute as a result of the recent District Court decision and other decisions affecting appropriations. In light of the continuing need and the fact that significant funds have not become available from other sources, we have reexamined your response of 24 November 1975 to our recommendation that the National Marine Fisheries Service apply Saltonstall-Kennedy funds to the solution of the tuna-porpoise problem. We disagree with your determination that such funds are not legally available for this purpose.

We believe, for the reasons set forth in the enclosed memorandum, that the law and the administrative practice, of which we are aware, support application of Saltonstall-Kennedy funds to the solution of the tuna-porpoise problem. Therefore, we recommend that you review your decision in this light in hopes that additional monies from this source can be applied to this very serious problem.

Sincerely,

JOHN R. TWISS, Jr.,
Executive Director.

Enclosure.

MARINE MAMMAL COMMISSION,
Washington, D.C., July 19, 1976.

Mr. ROBERT W. SCHONING,
Director, National Marine Fisheries Service, NOAA, Department of Commerce, Washington, D.C.

DEAR MR. SCHONING: I am writing with further reference to the availability of Saltonstall-Kennedy funds for support of research related to the tuna-porpoise problem.

As you know, the need for additional funding for support of tuna-porpoise research continues and, if anything, has grown more acute as a result of the recent District Court decision and other decisions affecting appropriations. In light of the continuing need and the fact that significant funds have not become available from other sources, we have reexamined your response of 24 November 1975 to our recommendation that the National Marine Fisheries Service apply Saltonstall-Kennedy funds to the solution of the tuna-porpoise problem. We disagree with your determination that such funds are not legally available for this purpose.

We believe, for the reasons set forth in the enclosed memorandum, that the law and the administrative practice, of which we are aware, support application of Saltonstall-Kennedy funds to the solution of the tuna-porpoise problem. We would, therefore, be grateful if you would once again review your decision in this light. We hope that this will open another source of potential funding for this very serious problem.

Sincerely,

JOHN R. TWISS, Jr.,
Executive Director.

Enclosure.

MEMORANDUM

Question. Is the use of Saltonstall-Kennedy funds, available pursuant to 15 U.S.C. §713C-3(a), to support tuna-porpoise research for which appropriations have been made under the Marine Mammal Protection Act, proscribed by the Comptroller General's rule that "the existence of a specific appropriation for an object precludes the use of a more general appropriation which would otherwise be available"?

Conclusion. No, the Comptroller General's rule does not prevent use of Saltonstall-Kennedy funds for research aimed at solving the tuna-porpoise problem. The determination of the National Marine Fisheries Service, expressed in Mr. Schoning's letter of 24 November 1975, and based on a series of decisions cited at pages 8-9 of the GAO. Office of General Counsel's Manual, that the rule prevents such a use of the fund is contrary to the intent and purpose of the rule, ignores the Congressional intent in establishing the fund, and is inconsistent with the early practice in administering it which is available for review.

DISCUSSION

(1) *The Comptroller General's rule is appropriately applied only when Congressional intent is not apparent.*

In general, the opinions cited in the excerpt from the Office of General Counsel's Manual do establish the principle that funds from general appropriations may not be used to supplement funds provided by a specific appropriation which has been made available for a particular purpose.

Underlying the rule stated in each of the cited opinions is the basic admonition of 31 U.S.C. §628 (previously, Section 3678, Revised Statutes) that:

"All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

20 *Comp. Gen.* 272, 274. The rule announced in each of these opinions is designed to prevent abuse of the appropriations process by ensuring that, consistent with the prohibition of Section 628, funds made available by a general appropriation are not utilized for purposes which were not approved by Congress, and that appropriations are not applied to objects for which they were not made. The Comptroller General's rule serves as a guide by which to determine, or infer, Congressional intent with respect to whether or not a general appropriation is available for a specific purpose when that intent is not otherwise apparent. The rule of construction is based upon the rationale that in specifically appropriating funds to be applied to a particular object, Congress is *presumed* to have made general appropriations for purposes other than that particular object. This rationale is similar to that of the well known rule of statutory interpretation—*expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another).

Resort to this rule is obviously necessary and appropriate only when there is some question as to whether or not Section 628 would be violated, and when Congressional intent with respect to the purposes for which an appropriation was made is not apparent. The rule is unnecessary and not applicable when

Congressional intent is expressed or when it can be reasonably inferred from legislative history and implicit approval of administrative practice.

(2) *The Saltonstall-Kennedy fund was established as a source of supplemental funding, to be applied at the discretion of administrators who are responsible for fisheries research. The Comptroller General's rule is not applicable to this source of discretionary and supplemental funds.*

Section 713C-3(a)(3) is a clear expression of Congressional intent that Saltonstall-Kennedy funds be used to, among other things, "conduct any biological, technological, or other research pertaining to American fisheries." These objectives are further clarified by the legislative history. In support of this Section during floor debates, Senator Duff outlined the types of research envisioned by the bill's sponsors. He included: "biological-oceanographic research," "a statistical program necessary for maintenance of authentic records of landings * * * for use of industry and as an aid to the biologist," and "exploratory fishing and gear development * * * to improve methods of detecting and capturing fish." 100 *Cong. Rec.* 6582 (1954). The necessary tuna-porpoise research program includes many of the elements to which Seantor Duff made reference, and undeniably comes within the general purpose for which the funds were established—to enhance the viability of American fisheries industries by means of research and development. *U.S. Code Cong. and Admin. News*, 83d Cong. 2d Sess. 2479 (1954).

An examination of the legislative history reveals that creation of the Saltonstall-Kennedy fund was a conscious decision to vest substantial discretion in the administrators who develop and implement fisheries research, and it escaped no one's attention that creation of such a discretionary fund was a serious departure from the detailed fiscal control and review of proposed expenditures which is usually exercised by Congress and safeguarded by the Comptroller General's rule.

Several times, the Acting Director of the Bureau of the Budget argued that "the * * * method of financing this program is contrary to sound budgetary practice * * * because it removes the program from review by the President and the Congress as a part of the annual budget process * * *" [*U.S. Code Cong. and Admin. News*, 83d Cong., 2d Sess., 2482 (letters of 27 August 1953 and 25 February 1954), 2984 (letters of 27 August 1953) (1954).] Senator Aiken forcefully argued against creation of the fund because it "[did] not show up in the appropriation figures each year, and the public [was] unaware of what the amount [was]." He urged that, instead of utilizing a portion of the 30% of tariff receipts on fish imports (at that time going to agricultural research activities), fisheries research be financed out of the remaining 70% by means of a specific appropriation over which control could be exercised. 100 *Cong. Rec.* 6585 (1954). Congress chose to establish the fund despite these arguments, and in so doing, elected to vest administrative officials with substantial discretion, theretofore exercised by Congress itself through the annual appropriations process, to control expenditures for fisheries research. The following colloquy is illustrative of the discussions in the Senate on this subject and reflects the intent to establish a source of discretionary, supplemental funds which would not be subject to the ordinary Congressional appropriations process:

"Mr. AIKEN. I wonder whether the Senator can tell us what the advantage is of an indirect appropriation over a direct appropriation for the purpose of conducting fishery research. What is the advantage, instead of making a direct appropriation for fishery research—and I am sure there would be no objection on my part to increasing the amount to whatever may be needed—of having the money appropriated to the Department of Agriculture and then transferred to fisheries?

"Mr. DUFF. I may say to the Senator from Vermont that in the case of agriculture the system has been very successful in connection with the funds which have been made available to the Department of Agriculture, and it is our hope that fisheries may likewise be benefited. In other words, what is good for the goose is good for the gander.

* * * * * * *

"Mr. MAGNUSON. The advantage is that fishery research may take, in some cases, 3 or 4 years. Such research is a long-time project. The advantage is that we will know there will be available a small amount of money with which to do the research work, instead of having to come to the Committee on Appropriations every year to fight for an appropriation. The same thing is being done for agriculture, and I am all for it.

"I am a member of the Committee on Appropriations, and I know how hard it is to obtain funds for research. Every year it is necessary for such an item to go through the Bureau of the Budget. The first funds the Bureau cuts off are research funds. That has been done to such an extent that there has been very little fishery research, and the result has been that the whole fishing industry in the United States, which is a big industry and employs a great many persons, is going down and down.

* * * * * * *

"Mr. AIKEN. There is now more than 70 percent out in the open which those interested in fisheries could ask for. Why go after what is already appropriated to another purpose? It is directly contrary to what I thought was the policy of the Senate, namely, to have all appropriations out in the open where people can see them. It is directly contrary to the recommendation of the Hoover Commission, for which Congress appropriated $2 million.

"Mr. MAGNUSON. Mr. Hoover was a bad fisherman. Probably that is the explanation."

100 CONG. REC. 6585 (1954).

The legislative history indicates that the usual presumption, that general appropriations are available only for those purposes for which specific appropriations are not made, is not applicable to Saltonstall-Kennedy funds. Those who had an opportunity to consider and comment on Section 713C-3(a) prior to its enactment had no doubts that the funds from this "general appropriation" would be used to supplement specific appropriations for ongoing research. For example, the Assistant Secretary of the Interior stated, in a letter of April 1, 1954 to the Chairman of the House Committee on Merchant Marine and Fisheries:

"Unquestionably there is an acute need for greatly *expanded* research with respect to certain basic problems which the fishing industry itself cannot effectively finance or coordinate. This is particularly true with respect to technological and biological studies. The Department of the Interior, through the Fish and Wildlife Service, *presently is attempting to solve some of these problems.* As the agency primarily responsible for the welfare of the domestic fisheries, it collects and publishes basic statistics; conducts a daily market news service; makes economic studies; administers the Fishery Cooperative Marketing Act; develops methods of handling, utilizing, and preserving fishery products; conducts research on all technological fishery matters; conducts an educational service; develops foreign and domestic markets; explores for new fishing grounds; develops and tests fishing gear; conducts biological research on all our fisheries; and manages the fisheries of Alaska. Many of these activities have been limited, however, by a lack of available funds. If the fishing industry of this country is to continue to compete on an equal basis with the fishing industries of other countries, many of which are directly subsidized, *it is essential that a substantial increase in funds for these purposes be made available.*" (Emphasis added.)

U.S. Code Cong. and Admin. News, 83d Cong., 2d Sess., 2480 (1954). In the Senate, it was stressed repeatedly (with various amounts being cited) that several million dollars would be available pursuant to other appropriations for purposes covered by the Saltonstall-Kennedy fund. *See, e.g.*, 100 *Cong. Rec.* 6581 (1954) (remarks of Senators Aiken, Duff and Magnuson); 100 *Cong. Rec.* 6585 (1954) (remarks of Senator Saltonstall); 100 *Cong. Rec.* 6587 (1954) (remarks of Senators Magnuson and Aiken). Senator Aiken pointed out, for example, that the budget upon which FY 1955 appropriations for the Fish and Wildlife Service would be based included specific appropriations of $353,000 for exploratory fishing, $282,000 for technological research, $150,000 for statistics, $43,000 for economics, $280,000 for market news, and $1,725,000 for the Branch of Fisheries Biology, of which $214,000 was scheduled for shellfish investigations. 100 *Cong. Rec.* 6581 (1954). Thus it was no secret to those involved that the Saltonstall-Kennedy funds were to supplement other "specific appropriations" for fisheries research.

(3) *The Saltonstall-Kennedy fund has been administered as a source of supplemental funding to which the Comptroller General's rule is not applicable.*

The validity of the conclusions to be drawn from this legislative history is bolstered by administrative practice in applying Saltonstall-Kennedy funds to fisheries research.

Although we have not had an opportunity to review copies of recent reports on the administration of Saltonstall-Kennedy funds, the enclosed copy of excerpts from the Annual Report of the Secretary of the Interior, "Research and Activities Under the Saltonstall-Kennedy Act, Fiscal Year 1956" reveals that Saltonstall-Kennedy funds were, consistent with Congressional intent, applied to program activities for which other funds were also specifically appropriated as part of the regular Fish and Wildlife Service Appropriation.

As Mr. Schoning notes in his letter, Saltonstall-Kennedy funds were established for broad general purposes, and it is our understanding that these funds have uniformly been applied to supplement fisheries research and development programs for which specific appropriations were made, and that this practice by the Fish and Wildlife Service and then by the National Marine Fisheries Service brought no objection from the Congress or from the Comptroller General. To restrict application of Saltonstall-Kennedy funds to only those activities for which specific appropriations have not been made, in the absence of any indication from GAO that they are so restricted, would be inconsistent with past practice and would unduly narrow their utility for the general purposes for which they were created.

(4) *The cited opinions illustrating the Comptroller General's rule are clearly distinguishable from the present case.*

As noted above, the Saltonstall-Kennedy fund was intended as a source of funding to supplement activities for which specific appropriations were and would be made. A presumption concerning Congressional intent in establishing the fund is therefore unnecessary since it is expressed in the legislative history. The presumption that Saltonstall-Kennedy funds should not be available when specific appropriations are made is rebutted by that legislative history.

An examination of the factual situations upon which the cited opinions were based indicates that, contrary to the present case, the rule was invoked precisely because there was no legislative history to support the use of both general and specific appropriations for the same purpose.

In B-13468 (20 *Comp. Gen.* 272), the Secretary of the Navy proposed to use general funds, appropriated pursuant to an act approved on July 19, 1940, to add a penthouse to a new wing of the Navy Department Building. A specific appropriation for the wing had been approved only three months after the first act, on October 9, 1940. While the general authorization was worded so as to arguably include the proposed expenditure, it was by no means clear that Congress had intended such a result. An intention to exclude the use of general funds was presumed from the nearly contemporaneous, specific provision for the wing in another act.

Similarly, in B-11810 (20 *Comp. Gen.* 102), cited in B-13468, the Secretary of the Navy was denied approval to use funds, appropriated to provide "necessary buildings, facilities, utilities, and appurtenances thereto * * * " associated with national defense construction, for the purpose of housing workers engaged in shipbuilding and airplane production programs. The *very same act* contained a specific appropriation for "making necessary housing available for persons engaged in national-defense activities." P.L. 76-671, 54 Stat. 681 (1940). In light of that fact, the Comptroller General concluded: "[h]aving thus specifically legislated on the subject, it is not to be inferred that the Congress intended, by the same act and without express mention, to authorize the general use [proposed by the Secretary]." (20 *Comp. Gen.* at 103, 104).

The leading case cited in the General Counsel's Manual is B-9460 (19 *Comp. Gen.* 892). There, the Secretary of the Interior sought agreement that use of general appropriation funds to supplement an expenditure of $45,000, specifically appropriated for the construction of a warehouse in Alaska, was acceptable. The Comptroller General disagreed and inferred that Congress must have intended, by its specific consideration and approval of funding for the warehouse, to exclude the use of other funds.

In B-118803, the general appropriation expressly provided for "necessary operating expenses of the Veterans Administration, *not otherwise provided for*".

The Comptroller General ruled that funds from this source were not available for expenses for which a specific appropriation had been made and "otherwise provided." As noted above, the legislative history of the Saltonstall-Kennedy fund is clear that the Congressional intent with respect to use of those funds was exactly opposite—they were intended for use as supplemental funds.

The remaining cases cited in the Manual involved similar factual patterns. In B–130109 (36 *Comp. Gen.* 526), the Secretary of Commerce was denied permission to use general appropriation funds in addition to an $18,000,000 supplemental appropriation for an atomic powered merchant ship. The Comptroller General, impressed by the fact that both appropriations were before the Congress *at the same time*, determined that Congress could not have intended such a use. Otherwise, there would have been no reason for Congress to specify any particular sum for the vessel; it simply could have added $18,000,000 to the general appropriation. The Secretary of Commerce unsuccessfully contended that this, in fact, was the proper interpretation of the supplemental appropriation. In B–138598 (38 *Comp. Gen.* 758), the Administrator of the General Services Administration was not allowed to accept payment from the Federal Aviation Agency for renovation of an office building. The decision was based primarily on consideration of 41 U.S.C. §12, discussed below. The Comptroller General's opinion was bolstered by the fact that, since GSA had a specific appropriation for such renovations, Congress could not have intended to permit the use of other funds for such purposes.

Finally, it should be noted that most of the cases cited in the Manual involved a second statutory prohibition, in addition to that contained in 31 U.S.C. §628. Section 12 of Title 41, United States Code (at that time, Section 3733, Revised Statutes) provides:

"No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

Thus, in these opinions the Comptroller General was constrained by Section 12 to limit the costs of the buildings involved to a specifically appropriated amount. In B–13468 (20 *Comp. Gen.* 272), Congress was presumed to have decided upon a wing of the Navy Department Building without a penthouse; in B–11810 (20 *Comp. Gen.* 102), a specific amount was provided for government housing, and Section 12 would have prohibited any additional expenditures; and in B–9460 (19 *Comp. Gen.* 892), Congress had approved only a $45,000 warehouse. As noted above, the primary consideration upon which the decision in B–138598 (38 *Comp. Gen.* 758) rested was 41 U.S.C. §12; because the FAA had no specific appropriation for "public improvements," *none* of its funds were available for building renovations. Clearly, no such constraint is applicable to the use of Saltonstall-Kennedy funds for tuna-porpoise research.

U.S. DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
NATIONAL MARINE FISHERIES SERVICE,
Washington, D.C., November 24, 1975.

Mr. JOHN R. TWISS,
Executive Director, Marine Mammal Commission, 1625 Eye Street NW.,
Washington, D.C.

DEAR JOHN: Your letter of November 18, 1975, stated that "The Commission recommends that the National Marine Fisheries Service apply 'Saltonstall-Kennedy' funds (15 USC 713C–3(a)) to a solution of the tuna/porpoise problem." As was indicated at a meeting on this subject in Congressman Leggett's office, on November 19, 1975, we believe that the use of Saltonstall-Kennedy funds, which has broad general purposes, for Marine Mammal Protection Act purposes, may be a violation of the GAO rulings regarding the use of appropriations. Essentially, the Comptroller General has stated that "the rule is well established that the existence of a specific appropriation for an object precludes the use of a more general appropriation which would otherwise be available." An excerpt from the General Accounting Office's, Office of General Counsel manual, is enclosed for your information.

In addition to this specific legal problem, there are other problems which could preclude the use of Saltonstall-Kennedy funds for Marine Mammal Protection Act purposes. We will be glad to discuss this matter further with you. I hope we can resolve the funding problems that face us in regard to research on marine mammals.

Furthermore, I would appreciate any suggestions and recommendations that you may have with respect to our mutual obligation to find an answer to the tuna/porpoise problem.

Sincerely,

Robert W. Schoning,
Director.

Enclosure.

Marine Mammal Commission,
Washington, D.C., November 18, 1975.

Mr. Robert W. Schoning,
Director, National Marine Fisheries Service, NOAA, Department of Commerce, Washington, D.C.

Dear Mr. Schoning: In reviewing the tuna-porpoise problem, it has been repeatedly shown that a major stumbling block is the availability of funds for research. The Commission recommends that the National Marine Fisheries Service apply "Saltonstall-Kennedy" funds (15USC 713C–3(a)) to a solution of the tuna-porpoise problem. This is certainly consistent with one of the stated purposes for those funds, "to conduct any biological, technological or other research pertaining to American fisheries."

Sincerely,

John R. Twiss, Jr.,
Executive Director.

Mr. Spensley. Do you have any indication why they have not been able to reach a decision on that?

Mr. Eisenbud. At least the recent history of that discussion is set forth in the back of the Commission's annual report for calendar year 1976, where there is a descriptive list of letters relating to this and other matters.

The basic problem, as I understand it, Mr. Spensley, is that there was uncertainty as to whether SK funds were legally available to apply to the tuna-porpoise problem. Funds for research on this problem were authorized in the Act, and it was a question of whether you could use SK funds to supplement an already itemized program.

We felt that SK funds could be applied. They felt that they could not. We recommended that they seek advice on that question from GAO.

I am glad to learn that this question has apparently been resolved so that SK funds will be utilized.

Mr. Spensley. Thank you.

Mr. Leggett. OK.

Thank you very much.

We are going to adjourn at this time, and those who want to see the movie, come back at 1:45 p.m. The hearing will start at 2 o'clock.

We will attempt to have the witnesses such that we will not get all of the commercial side at one time, but infiltrated with other concerns, as well.

So the printed schedule will not be precisely adhered to, perhaps.

The committee stands adjourned.

[Whereupon, at 12:05 p.m., the subcommittee recessed, to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

Mr. LEGGETT. The meeting of the subcommittee will please come back to order.

The record will show that we have just reviewed a movie on purse seining which was provided, courtesy, I guess, of the American Tuna Boat Association.

It was a very pretty movie and certainly showed some ideal methods of setting.

Hopefully, we can make that the optimum average condition.

Mr. Tobin, I believe, you are from the longshoremen.

We are glad to have you here.

As I understand, you have to get out of here quickly.

Are you reading the statement of John J. Royal?

Mr. TOBIN. Yes.

Mr. LEGGETT. Your statement will appear in the record as though fully delivered and you can expand on it or do whatever you want.

[The statement of John J. Royal as presented by Mr. Tobin follows:]

STATEMENT OF JOHN J. ROYAL, FISHERMEN AND ALLIED WORKERS' UNION OF SAN PEDRO AND SAN DIEGO, CALIF., INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

Thank you, Mr. Chairman, for this opportunity to submit to you and this Committee some of my views and concerns about the current application of the Marine Mammal Protection Act

My name is John J. Royal. I am the Executive Secretary-Treasurer of the Fishermen and Allied Workers' Union of San Pedro and San Diego, California, affiliated with the International Longshoremen's and Warehousemen's Union of the West Coast of America, Alaska and Hawaii. (Mr. Harry Bridges being the International President.) The membership of my organization is made up of Coastal Fishermen and High-Seas Tuna Fishermen, who, in order to provide a livelihood for their families and a continuing source of high protein food for the citizens of the United States, fish from Catalina Island to the tip of South America, the vast expanse of the Pacific Ocean and on to the shores of Africa. Their return catches of Tuna and other commercial species provide employment for thousands upon thousands of shoreside cannery workers and other allied trade workers, without which fish the U.S. Tuna Fishermen would most likely be placed on the rolls of the unemployed or welfare. On behalf of these people, I most strongly and most vigorously urge you to give us relief under the extension of the Marine Mammal Protection Act.

I have been a part of the U.S. tuna industry for over 30 years now in various capacities, starting out as a working fisherman and for the past 20 years as the head of the Union, not that this is all important, but only to demonstrate to you, Mr. Chairman, that I have been around sufficiently long to witness the great many changes that have occurred within the U.S. and world's fishing industries and in some way to qualify me to make some observations and more importantly some objections. The U.S. Tuna Fishermen, since the end of World War II, have been the vanguard of the juridical position of and for the United States of America. Several years ago when the Marine Mammal Protection Act was passed I was told by the members of the Congress, both in the House and in the Senate, that, should this legislation seriously affect the Tuna Industry and particularly the jobs of fishermen I represent, I should come back to you. Well I am back, and I am a requesting relief if we are to survive.

The Tuna Industry provides over 26% of the fish eaten by American families. It is a high protein, nutritious and economical food. Indeed, it can be said that America goes to lunch on tuna fish sandwiches. The loss of the U.S. tuna fleet and the jobs that go with it, which will happen if this Congress fails to provide relief, will be a tragedy for every American.

We are concerned about the protection of porpoise. The tuna industry has shown a remarkable improvement in the reduction of the take of porpoise in the last five years. We are working with the rest of the tuna industry to reduce this take still further. Of those porpoise surrounded by purse seine nets, 98.7% are freed. The small percentage (1.3%) taken today will be reduced even further as modern technology improves and is applied.

However, should you not grant relief and thereby permit the law to prohibit or limit severely the seining of tuna in association with porpoise, not only will you strangle the tuna industry in this country but you will also thereby ironically increase the porpoise taken and killed throughout the world. The reason is simple—foreign fishermen are under no such restrictions as U.S. fishermen. They do not have the porpoise saving gear and techniques, and they do not have the skills in the handling of purse seine nets. They will move their vessels into the porpoise schools being abandoned by U.S. vessels and slaughter porpoise indiscriminately.

In your capacity of representing the American people, I most vigorously urge you to give consideration to the jobs involved, to the nutrition involved, to the economy involved and, indeed, to the porpoise involved, and make it possible for U.S. tuna vessels and their crews to continue to fish for tuna in association with porpoise.

I will appear subsequently in person here in Washington and will visit with each and everyone of you to bring you this message personally. I thank you for the opportunity of submitting this statement today.

STATEMENT OF JOHN J. ROYAL, FISHERMEN AND ALLIED WORKERS' UNION OF SAN PEDRO AND SAN DIEGO, CALIF., AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, AS PRESENTED BY PATRICK TOBIN, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

Mr. Tobin. I just want to add very briefly that our union represents the fishermen on the boats throughout California; however, if this industry is more seriously damaged, or if it does not survive, it means jobs for men throughout our union, and I think in the area there are thousands of jobs that are dependent on tuna fish and I think that many good-meaning people are working the situation so that in protecting the life of the mammals, they are endangering the livelihood of millions of human beings.

Concern must be given first to the human beings involved in the industry.

We support all those efforts by the Government and the boat owners to improve the situation so that the mammal catch is down to a minimum, but I do want to remind those involved that when this legislation was passed, as Mr. Royal mentions in his testimony, we were assured that the industry would not be placed in a position that it is in at the moment.

It is our belief that what was stated by a Congressperson here and others, that should there be trouble, we should come back for relief and obviously relief is needed and needed very quickly or this industry will not survive.

The ships will go under foreign flags.

It means that our members will be out of work and all the attendant unemployment that will take place as a result of the loss of the American tuna industry.

I would like to submit the statement and thank you very much for the opportunity to speak.

Mr. LEGGETT. Thank you very much, Pat, and certainly it is the intent of this committee that neither the porpoise nor the tuna industry meet their demise.

From the movie we have just seen, I think we have seen that the two are not mutually inconsistent, so we must pursue the goals which are set for the committee and whether or not we need any additional legislation remains to be seen.

If there are no further questions, we will move to the next witness.

The next witness will be Mr. August Felando, executive director of the American Tunaboat Association.

Let me see, is Commissioner Del Rio here?

Commissioner DEL RIO. Yes; I am.

Mr. LEGGETT. Well, it is our normal procedure to take Members and Delegates out of order.

We have your statement and it will appear in our record.

If you would like to deliver it or make any extemporaneous points in this regard, certainly, you are welcome and recognized.

STATEMENT OF HON. BALTASAR CORRADA DEL RIO, RESIDENT COMMISSIONER, COMMONWEALTH OF PUERTO RICO

Commissioner CORRADA. Thank you very much, Mr. Chairman.

Mr. DON ALLEN is assisting me here.

My statement has been distributed to the members of the subcommittee, so I will not go ahead and read it.

However, I would like to make two corrections in the statement.

On page 2, of the first paragraph, third line from the bottom in that paragraph, after "Puerto Rican boats," the phrase "could be tied up" should be inserted.

Mr. LEGGETT. Okay, that will be corrected in our record.

Commissioner CORRADA. On that same page, Mr. Chairman, the last paragraph, second line from the top of that paragraph, the first two words in that second line should be "operating fully."

Mr. LEGGETT. All right.

That will be corrected.

Commissioner CORRADA. And, Mr. Chairman, my statement, as you can see, basically states the position that we definitely support strong measures to reduce porpoise mortality to minimal levels.

At the same time, we believe that to attain this basic and fundamental mechanisms would have to be developed in a balanced manner and perhaps concurrently if we want to achieve a balanced solution to the problem.

First, negotiation of international agreements to protect marine mammals; second, scientific studies concerning the various porpoise species and the association with tuna; third, scientific and technical efforts to improve fishing gear and techniques aimed at protecting porpoise; and fourth, regulations to govern activities of the U.S. fleet and preclude imports of yellowfin tuna caught with methods that are causing greater porpoise mortality and injury than the U.S. fleet.

However, if developments in this directions do not go together and we take certain action that is not in concert with international agreements, then we might be hurting the U.S. tuna industry while, at the same time, not solving the problem, but we will just have foreign tunaboats violating each and every objective or method that we prescribe for the U.S. based tuna industry.

In this regard, I want to mention that the tuna industry is tremendously important for Puerto Rico.

It employs over 6,682 canning workers in our Island, and with the large unemployment problem which we have there, which is over 20 percent, any measure that would not be balanced in the sense that at the same time we protect the marine mammals and the porpoise, we also protect the industry, might be harmful to our economy.

There is an annual payroll in Puerto Rico of $34.6 million to our workers down here that are associated with the tuna canning industry in Puerto Rico.

Together with my full statement and these remarks, I would like to bring this matter to the attention of the subcommittee, Mr. Chairman.

Mr. LEGGETT. Very good.

We are well aware of the significance of the tuna industry and, as you indicate, 40 percent of the tuna production comes out of your canneries.

I guess a lot of the fish canned comes from the boats that originate in Puerto Rico and also some of the boats that come, perhaps, from Southern California.

Commissioner CORRADA. Right.

Mr. LEGGETT. We are well aware of your horrendous unemployment and anything that aggravates that, of course, is a problem.

As I have indicated, I think it is the view of the committee that we can achieve full employment of the tuna industry and also full survival of the mammal industry.

Sometimes the two appear to be at odds.

Commissioner CORRADA. Mr. Chairman, I commend you and your subcommittee for your endeavor and objectives, and I hope that a balanced formula can be obtained so that both objectives which are important to us will materialize.

Mr. LEGGETT. This committee wants to help Puerto Rico in any way it possibly can. We are very concerned with your welfare.

Commissioner CORRADA. Thank you very much, Mr. Chairman.

Mr. LEGGETT. We do not want to offer you Statehood; you may not want it.

Commissioner CORRADA. Well, I hope that in the near future we will be prepared for that and as many other Members of Congress have said: When you are ready, we are ready, and I hope we will become ready soon enough.

Mr. LEGGETT. As you can see, if you are a State like California, with respect to tuna, it will not help you much.

Commissioner CORRADA. Right.

Mr. LEGGETT. Do any members have any questions?

It was nice to have you before the committee.

Please feel free to join us at the table if you like.

Thank you very much.

[The complete statement of Commissioner Baltasar Corrada Del Rio follows:]

STATEMENT OF HON. BALTASAR CORRADA DEL RIO, RESIDENT COMMISSIONER, COMMONWEALTH OF PUERTO RICO

Mr. Chairman, Members of the Committee, ladies and gentlemen, I appear before you today to emphasize the serious concern of the people of Puerto Rico in the continued vitality of the Puerto Rican tuna fleet and tuna canning industry. Tuna has been a major growth industry in Puerto Rico. It employs directly 6,682 canning workers and indirectly another 12,000 plus crewmembers and shore personnel to directly support some 50 tuna vessels.

Tuna canning employment also represents 5 percent of all and 7 percent of female manufacturing employment in Puerto Rico with an annual payroll of $34.6 million. Fiscal Year 1976 shipments to the United States mainland totalled $226 million, represented more than 40 percent of the entire U. S. output and were the largest single item in Puerto Rican sales. Significantly, the tuna canning industry is highly concentrated and represents 38 percent and 43 percent, respectively, of total manufacturing employment in Ponce and Mayaguez, the second and third largest cities in Puerto Rico.

Representatives of the Commonwealth have appeared before this committee and before the National Marine Fisheries Service to report the multiplier effect on Puerto Rico of the U.S. recession (from which we have not yet recovered), our 20 percent unemployment (which understates the reality of more than 30 percent), population density of more than 920 per square mile, lack of water power and mineral resources, high energy costs, scarcity of arable land and a need for more than 500,000 jobs right now to reach U.S. mainland levels of employment and labor participation.

Members of the committee, if supplies to the Puerto Rican tuna canning industry are endangered, it could close plants in Puerto Rico rather than simply reducing employment and output, because some plants may be pushed below the break-even point. I understand that many U.S. tuna boats including Puerto Rican boats, could be are tied up and unable to fish by court order until the U.S. Department of Commerce issues the 1977 regulations concerning fishing on yellowfin tuna in association with porpoise.

Let me emphasize that the people of Puerto Rico strongly favor measures to reduce porpoise mortality to minimal levels. Much has been accomplished. Much remains to be done. However, it appears to me that something is seriously wrong with the mix of measures, timing, resources and administrative determination to carry out the current law. My understanding is that the key actions embodied in the 1972 Marine Mammal Protections Act are: (1) negotiation of international agreements to protect marine mammals, (2) scientific studies concerning the various porpoise species and the association with tuna, (3) scientific and technical efforts to improve fishing gear and techniques aimed at protecting porpoise, and (4) regulations to govern activities of the U.S. fleet and preclude imports of yellowfin tuna caught with methods causing greater porpoise mortality and injury than the U.S. fleet.

Something is wrong, because a substantial part of the U.S. tuna fleet is not operating fully, effective international agreements including compliance have not been negotiated, improvements in fishing technique and technology are at issue and the 1977 regulations are still pending.

Members of the Committee, I urge a careful review of the provisions of the Marine Mammal Protection Act, and of the implementation measures, timing and resources applied, so that you may establish what changes are necessary both to protect the porpoise and also to assure the continued vigour of the U.S. and Puerto Rican tuna fleet and canning industry.

Mr. LEGGETT. Our next witness is Mr. Felando.

Please identify the folks that you have at the table.

That will be helpful for our record.

STATEMENT OF AUGUST FELANDO, ON BEHALF OF THE AMERICAN TUNABOAT ASSOCIATION, ACCOMPANIED BY HAROLD CARY, OCEAN FISHERIES, INC.; FRANKLIN G. ALVERSON, VICE PRESIDENT, LIVING MARINE RESOURCES, INC.; CAPT. MANUEL SILVA, PRESIDENT OF THE AMERICAN TUNABOAT ASSOCIATION; CAPT. MANUEL JORGE, CAPTAIN OF THE ELIZABETH C. J.; JOSEPH A. THOMPSON, PRESIDENT, SEAVISION PRODUCTIONS; STEVE EDNEY, PRESIDENT OF UNITED CANNERY WORKERS, AFL–CIO; JIM BOZZO, SECRETARY-TREASURER OF FISHERMEN'S UNION, AFL–CIO; AND JACK TARENTINO, PRESIDENT OF FISHERMEN'S UNION, AFL–CIO

Mr. FELANDO. Mr. Chairman, to my far left we have Harold Cary.

Mr. Cary has a prepared statement.

Mr. Cary was the general manager of the American Tunaboat Association from 1947——

Mr. LEGGETT. C-a-r-y?

Mr. CARY. Yes.

Mr. FELANDO. He was general manager from 1947 through mid-1959.

At the present time he is with Ocean Fisheries, which manages, I believe, 11 or 12 vessels.

Next to me is Mr. Frank Alverson who is with LMR.

He is available to talk about populations.

Mr. LEGGETT. Mr. Alverson, is he with the Tuna-Porpoise Foundation?

Mr. FELANDO. No.

He is a consultant. LMR is the consulting group with the Porpoise Rescue Foundation.

To my right is Manuel Silva, president of the American Tunaboat Association.

He has been a skipper for 25 or 26 years and presently owns and operates two vessels, the *Proud Heritage* and the *Sea Quest*.

Excuse me, they switched seats on me.

The man to my right is Captain Manuel Jorge, who is the captain of the *Elizabeth C. J.*, and managing owner of that vessel.

He and his brother were both on the *Elizabeth C. J.* on the last cruise that was mentioned in the Smithsonian magazine.

Mr. LEGGETT. Captain Jorge is the captain of the *Elizabeth C. J.*, and——

Mr. FELANDO. That is right.

He also manages another vessel, the *Marie C. J.*

Next to him is Manuel Silva, and then to my far right is Joe Thompson.

He was the photographer who was selected by the Government to do all the underwater photography during the cruise, the research cruise of the *Elizabeth C.J.*, and he was the one who wrote the script, subject to changes and corrections by the Government and ourselves, and made the movie that you just saw.

Mr. Thompson is recognized as one of the world's finest underwater photographers.

I believe he worked for Jacque Cousteau for 11 years.

I do not want to fill up the record with all of the achievements he has recorded, but we believe he did a fantastic job on the *Elizabeth C.J.*

I think he shot about 11,000 feet of underwater film.

Mr. LEGGETT. How many feet of film did we see in that movie?

Mr. THOMPSON. About 500 feet, approximately, 15 minutes.

Mr. FELANDO. Mr. Chairman, we have just two prepared statements, one by myself and one by Mr. Cary.

I would like to lead off with Mr. Cary.

Mr. LEGGETT. Do we have a representative officer from the United Cannery Workers?

Mr. FELANDO. I believe Steve Edney is here.

I believe he also has a prepared statement.

Mr. LEGGETT. All right, very good.

Mr. FELANDO. Harold.

Mr. CARY. Harold F. Cary.

I have made a very short statement, about 4 pages.

I will read most of it, but there is a slight repetition.

Mr. LEGGETT. Your statement will appear in the record as printed.

I. THE PROBLEM:

Mr. CARY. We fish yellowfin tuna associated with porpoise schools. It is the presence of these creatures which make the fishery and its expansion possible. Without the porpoise populations the fishery would collapse for all engaged in it.

It is mandatory that we solve the problem of maintaining these populations. It is necessary that we solve it internationally.

The U.S. purse seine fleet which is the key to the presence of tuna processors in this country cannot solve or be used to solve it alone. The U.S. fleet will continue to endeavor to solve it alone so long as it is able to operate.

If the U.S. fleet is destroyed, no solution results. The U.S. fleet is out of business. No porpoises are saved. No research of scale is possible.

Fishermen and environmentalists have the same goal—to preserve porpoise stocks. Fishermen have it because their livelihood depends upon it. Environmentalists have it because they believe it to be in the common interest.

The problem is that fishermen believe that the problem can be solved progressively by continuing research and improvement in fishing techniques. Environmentalists believe it can be solved immediately or rapidly through multiple restrictions placed upon the U.S. fleet.

II. THE INDUSTRY:

I will only read the first paragraph.

The archives are full of data on the fishery and its importance in U.S. fisheries and the importance of tuna processing. This will not be repeated here.

III. PRESENT SITUATION:

Uncertainty and confusion are the dominant conditions in the industry. We have faced many problems before. This time it is fair to say we do not know where we are going.

National Marine Fisheries Service has prepared an impact analysis of proposed rules which measures the distress in dismal detail. This is a view of where we are headed.

A measure of uncertainty and confusion is found in the 18 legal and administrative proceedings concerning porpoises in which the industry is or has been engaged in the last year. These are by no means ended. One of the most recent was a series of hearings before an administrative law judge in which about 3,300 pages of testimony were taken.

These proceedings are now a way of life and sap the vitality of the industry. No industry can long survive in an atmosphere of uncertainty where ability to operate is subject to month to month review and determination.

It is no longer a matter of how progressive, efficient, and competitive we are. It is a matter of how convincing we are in these manifold proceedings. Fishing strategy is determined by the courts. By these means the fishery is essentially deprived of the use of skills and knowledge of the sea and its resources which built an industry.

IV. RESEARCH AND QUOTAS:

Tuna people are not strangers to marine scientists, marine science, or estimates of populations.

Before there were any investigations of or much interest in tuna resources and their abundance, the industry urged formation of the Inter-American Tropical Tuna Commission to undertake such work. In late 1948 I appeared before the Senate Foreign Relations Committee at the time it approved the basic treaty with Costa Rica to form the Commission.

In 1949, the Commission began its work.

In 1966, 17 years later, the Commission decided that it had sufficient knowledge of yellowfin tuna populations within an area called the Commission's Yellowfin Regulatory Area—C.Y.R.A.—and that information required a catch quota of 79,300 tons for 1966. We were told that a catch in excess of 79,300 tons would begin the ruin of the fishery.

In the 10 years since 1966, the amount of the quota has progressively increased. In October at its annual meeting in Nicaragua, the Commission established a quota with an upper limit for 1977 of 210,000 tons for C.Y.R.A. area smaller than that in 1966. We now have a smaller area and a quota 165 percent greater.

It is evident that there is a small data base for porpoise population estimates. Data inadequacies were deplored at the La Jolla workshop in 1976. The proposed 1977 quota of 29,918 porpoises—with a greater number allotted for foreign fishing—is based on a virtually certain estimate of optimum sustainable population. In laymen's terms I am advised that this means there is about one chance in an astronomical 1,600 of anything adverse happening to the porpoise stocks.

What emerges clearly to the U.S. purse seine tuna fishery which will be adversely affected by the proposed 1977 quota and particularly by the accompanying prohibition of fishing yellowfin in association with mixed schools of porpoise, are these things:

First, knowledge of populations is in the early period of development, but is progressing.

Second, over conservatism—virtually certain estimates—is used to set quotas.

Third, time is needed to develop more useful knowledge, although progressive improvement in porpoise mortality should be expected in that time.

Fourth, the U.S. fleet must be kept operating as the surest and only major source of developing data in that time.

Fifth, it is possible to maintain a viable U.S. fishery and to reduce porpoise mortality at the same time.

V. THE LAW:

The purpose of the law as it relates to porpoises is that mortality be reduced to the lowest practicable level as quickly and effectively as possible.

Hearings records show that it was not the intent of the law to: (1) Stop tuna fishing; (2) Eliminate the fishery; (3) Force removal of the industry; (4) Give control to the judiciary; and (5) Set impossible immediate goals.

Naively, the fishery expected we would enter into a period of research and improvement in methods to reduce porpoise mortality on a cooperative and progressive basis and that progress in terms of reduced mortality rates would meet the criteria.

The fishery did not reckon with those forces who demanded that a solution be found immediately, urging that this was the intent of the law.

Now we need to change the law on a commonsense basis to the extent that it not only requires measureable results in reduced porpoise mortality but that it recognizes that this can only be done if the U.S. fleet has the legal right to fish tuna in association with porpoise, subject to safeguards.

VI. CONCLUSION:

The U.S. tuna fishery has worked cooperatively with and contributed much to scientific investigations of the tuna populations for many years. Without this cooperative work by the fleet, knowledge, available to the world, would not be far advanced. These stocks are in good condition.

The economic life of the purse seine vessel depends upon the preservation of porpoise populations. The contribution to knowledge in the field is in major part a result of the interest and contribution by the vessels in individual and cooperative research. The imposition of excessive restrictions upon the U.S. fleet which affect its ability to operate will eliminate what is by far the largest contribution to and means of conducting research.

It is clear that there is no such thing as instant knowledge or instant science—in fisheries or elsewhere.

Progress and improvement—ability and determination are the things that count. The industry record shows that all these elements are present and provide the means to the best possible solution in the real world.

We need the help of this committee to restore some sanity to a nightmarish situation.

That concludes my statement.

Mr. LEGGETT. Thank you very much, Mr. Cary.

Your complete statement will be included in the record.

[The full statement of Harold Cary follows:]

STATEMENT OF HAROLD CARY ON BEHALF OF THE AMERICAN TUNABOAT ASSOCIATION

I. THE PROBLEM

We fish yellowfin tuna associated with porpoise schools. It is the presence of these creatures which make the fishery and its expansion possible. Without the porpoise populations the fishery would collapse for all engaged in it.

It is mandatory that we solve the problem of maintaining these populations. It is necessary that we solve it internationally.

The United States purse seine fleet which is the key to the presence of tuna processors in this country cannot solve or be used to solve it alone. The United States fleet will continue to endeavor to solve it alone so long as it is able to operate.

If the United States fleet is destroyed, no solution results. The United States fleet is out of business. No porpoises are saved. No research of scale is possible.

Fishermen and environmentalists have the same goal—to preserve porpoise stocks. Fishermen have it because there livelihood depends upon it. Environmentalists have it because they believe it to be in the common interest.

The problem is that fishermen believe that the problem can be solved progressively by continuing research and improvement in fishing techniques. Environmentalists believe it can be solved immediately or rapidly through multiple restrictions placed upon the United States fleet.

II. THE INDUSTRY

The archives are full of data on the fishery and its importance in United States fisheries and the importance of tuna processing. This will not be repeated here.

The fishery represents most of California's landed fish value, nearly all of that of Puerto Rico and some of that American Samoa. There are landings in other areas.

Canned tuna overwhelmingly leads United States canned fish volume and value.

Thousands of persons are dependent upon it for employment in catching and processing tuna and by-products as well as in the entire range of activities from vessel building to final sale of canned tuna and by-products.

III. PRESENT SITUATION

Uncertainty and confusion are the dominant conditions in the industry. We have faced many problems before. This time it is fair to say we do not know where we are going.

National Marine Fisheries Service has prepared an Impact Analysis of Proposed Rules which measures the distress in dismal detail. This is a view of where are headed.

A measure of uncertainty and confusion is found in the 18 legal and administrative proceedings concerning porpoises in which the industry is or has been engaged in the last year. These are by no means ended. One of the most recent was a series of hearings before an Administrative Law Judge in which about 3,300 pages of testimony were taken.

These proceedings are now a way of life and sap the vitality of the industry. No industry can long survive in an atmosphere of uncertainty where ability to operate is subject to month to month review and determination.

It is no longer a matter of how progressive, efficient and competitive we are. It is a matter of how convincing we are in these manifold proceedings. Fishing strategy is determined by the courts. By these means the fishery is essentially deprived of the use of skills and knowledge of the sea and its resources which built an industry.

IV. RESEARCH AND QUOTAS

Tuna people are not strangers to marine scientists, marine science or estimates of populations.

Before there were any investigations of or much interest in tuna resources and their abundance, the industry urged formation of the Inter-American Tropical Tuna Commission to undertake such work. In late 1948 I appeared before the Senate Foreign Relations Committee at the time it approved the basic treaty with Costa Rica to form the Commission.

In 1949, the Commission began its work.

In 1966, seventeen years later, the Commission decided that it had sufficient knowledge of yellowfin tuna populations within an area called the Commission's Yellowfin Regulatory Area (C.Y.R.A.) and that information required a catch quota of 79,300 tons for 1966. We were told that a catch in excess of 79,300 tons would begin the ruin of the fishery.

In the ten years since 1966, the amount of the quota has progressively *increased*. In October at its annual meeting in Nicaragua, the Commission established a quota with an upper limit for 1977 of 210,000 for C.Y.R.A. area smaller than that in 1966. We now have a smaller area and a quota 165% greater.

It is evident that there is a small data base for porpoise population estimates. Data inadequacies were deplored at the La Jolla Workshop in 1976. The proposed 1977 quota of 29,918 porpoises (with a greater number allotted for foreign fishing) is based on a virtually certain estimate of optimum sustainable population. In laymen's terms I am advised that this means there is about 1 chance in an astronomical 1,600 of anything adverse happening to the porpoise stocks.

What emerges clearly to the United States purse seine tuna fishery which will be adversely affected by the proposed 1977 quota and particularly by the accompanying prohibition of fishing yellowfin in association with mixed schools of porpoise, are these things:

1. Knowledge of populations is in the early period of development, but is progressing.
2. Over conservatism (virtually certain estimates) is used to set quotas.
3. Time is needed to develop more useful knowledge, although progressive improvement in porpoise mortality should be expected in that time.
4. The United States Fleet must be kept operating as the surest and only major source of developing data in that time.
5. It is possible to maintain a viable United States fishery and to reduce porpoise mortality at the same time.

V. THE LAW

The purpose of the law as it relates to porpoises is that mortality be reduced to the lowest practicable level as quickly and effectively as possible.

Hearings records show that it was not the intent of the law to: (1) Stop tuna fishing; (2) eliminate the fishery; (3) force removal of the industry; (4) give control to the judiciary; and (5) set impossible immediate goals.

Naively the fishery expected we would enter into a period of research and improvement in methods to reduce porpoise mortality on a cooperative and progressive basis and that progress in terms of reduced mortality rates would meet the criteria.

The fishery did not reckon with those forces who demanded that a solution be found immediately, urging that this was the intent of the law.

Now we need to change the law on a common sense basis to the extent that it not only requires measureable results in reduced porpoise mortality but that it recognizes that this can only be done if the United States fleet has the legal right to fish tuna in association with porpoise, subject to safeguards.

VI. CONCLUSION

The United States tuna fishery has worked cooperatively with and contributed much to scientific investigations of the tuna populations for many years. Without this cooperative work by the fleet, knowledge, available to the world, would not be far advanced. These stocks are in good condition.

The economic life of the purse seine vessel depends upon the preservation of porpoise populations. The contribution to knowledge in the field is in major part a result of the interest and contribution by the vessels in individual and cooperative research. The imposition of excessive restrictions upon the United States fleet which affect its ability to operate will eliminate what is by far the largest contribution to and means of conducting research.

It is clear that there is no such thing as instant knowledge or instant science—in fisheries or elsewhere.

Progress and improvement—ability and determination are the things that count. The industry record shows that all these elements are present and provide the means to the best possible solution in the real world.

We need the help of this Committee to restore some sanity to a nightmarish situation.

Mr. LEGGETT. Let me see, Mr. Edney, do you want to give your statement at this point?

That might be helpful and then we will have Mr. Felando.

Mr. Edney, it is nice to have you back.

Mr. EDNEY. Thank you.

My name is Steve Edney, and I would like to correct the record that shows an incorrect speling of my name.

My name is spelled E-d-n-e-y.

I am president of United Cannery and Industrial Workers, AFL-CIO.

We represent some 9,000 members in California, Puerto Rico, and American Samoa.

We are frustrated and outraged by the pace with which NOAA is is moving on the permits as far as tunafish canneries are concerned; frustrated because when we spoke to you last year, we told you of some of the dire predictions of what would happen to the industry.

Some of this is becoming all too true sorrily.

In Puerto Rico, one large cannery has laid off the night-shift.

This is attributed to lack of fish. We are having small problems in the canneries in California, of people being laid off.

I wonder if the people who hold the destiny and the hopes of our members in their hands, I wonder if that—if the conditions were reversed, if the pace would be as slow as it is here.

I feel that they can move much faster on this problem.

There is no reason why we should be talking about April on the issue of permits.

It should have been done in January.

I think one of the things they can do is attempt to show the people of this Nation that their concern is to get on with the job of issuing those permits and if it is necessary to burn the midnight oil, they should do it.

I don't believe any problem is so complex that it requires a great amount of time contemplating, weighing and unweighing all of these problems.

It would seem to me that much of the data that they will make a determination on is before them. I think it is more a question of courage rather than a question of whether or not they are going to land on the right point, which will please all people.

I say that the cannery workers are frustrated because how will the court end this particular battle, if that is what it is?

We live from paycheck to paycheck and we are hurt by the uncertainty of the industry because investors are not necessarily going to come to put money into canneries which they feel don't have a chance of getting their money back, and I don't think anyone could blame them.

I often wonder, too, what kind of a mind is it that would put people, well, put animals ahead of people in the most callous way?

We can see that the industry has made tremendous progress in trying to control the incidental kill associated with the catching of tuna, and I think this should be recognized by all parties, but I also believe, too, that even though it is not perfect, we ought to recognize the suffering by human beings in this country.

I have heard a lot of the unemployment in Puerto Rico and we represent people there—19 to 20 percent official and 40 percent unofficial.

This only tells a part of the story but I want you to think, too, about the continental United States.

The Government figures are one set of figures, 8 or 10 percent.

We stated last time the figures of the AFL are much higher.

A lot of people have gone off the market looking for jobs. They do not have jobs. We are living in very dangerous times.

We see, and choose to call unbalanced, individuals taking into their hands solutions which have been disastrous.

When people are hungry, when they cannot get jobs and feel they have been pushed around, these people take actions.

I am not suggesting at all that that is the answer.

What I am trying to say to you is that we must think of people.

We have got to put people to work.

I know this administration is committed to putting people to work as a top priority.

It does not make any sense with billions of dollars to attempt to create new jobs and, on the other hand, you destroy a billion dollar industry employing 30,000 and 60,000 people.

It does not make sense.

At one large cannery there is some talk that they are going to build a cannery in New Zealand.

We also hear that Russia is trying to work out an agreement with Western Samoa to build a cannery in Western Samoa.

All of these things will impact upon the tuna industry.

We have heard of boat owners seeking to transfer to other countries.

Also, there are other boat owners who have sold their boats.

Once the foreigners get complete control of the fishing industry, you can kiss it goodbye here.

I hope this committe and all of the people here, whether environmentalists, industry people, or what have you, will understand that we have an obligation to keep our people working.

What is a nation if the people are not working, looking forward to going on welfare?

That is not the way.

We want a nation where people can contribute.

We want people who are not just consumers, but people who are producing.

This is the way we are going to keep our country great and if that in itself does not appeal to you, I will ask you to think of this, the person who is hungry, who is out of work, who is desperate, will not know boundaries, they will not stay in the ghettoes where they may be seemingly confined; they will go out to other areas and attack people.

The humane thing to do is to get behind the courageous stand taken by Administrative Law Judge Vandenhaven in which he recognized the problem.

I wish you could have been with us in San Diego when some 150 people took off work to come over to demonstrate their concern for their job.

I wish you could have heard the voices of some of those people who live off $5,000 and $6,000 a year who have a family to take care of.

They said, "We don't know what we will do if you destroy our jobs. We hope you will do something for us."

I don't know what it was that touched Judge Vanderhaven, whether it was the reality of the situation or whether or not in looking at the data, he came up with something that we believe we can live with.

I hope that you in your Oversight Committee will recognize that the law must be changed, that this Nation must not be polarized between parties.

Thank you very much, sir.

Mr. LEGGETT. Thank you, Mr. Edney.

You express yourself extemporaneously inordinately well, and I assure you it is the intent of this committee to promote the fishing industry and promote the environment.

That is the reason we enacted the 200-mile fishing bill to effect a fishing renaissance in the United States.

We do have sometimes intermittant problems and the reason for these hearings is to reaffirm the directions of the people of the United States who speak through Congress and perhaps allay some of the fears that many times are created as a result of decisions that are made in the third branch of government by courts on facts that are before them sometimes in a limited way, and we are a little bit more broad-gauge here.

Mr. Felando.

Mr. FELANDO. We have here Mr. Jim Bozzo, who is secretary-treasurer of the Fishermen's Union, AFL-CIO, and Mr. Jack Tarentino, who is the president of that Union.

Mr. BOZZO. My name is Jim Bozzo.

I am secretary-treasurer of the Fishermen's Union, AFL–CIO.

I find myself here unprepared as far as a written statement is concerned, but, for the record, I will make a brief statement for myself and my colleague, Jack Tarentino.

We represent 1,600 tuna fishermen.

As labor leaders, we are interested in jobs for our fishermen who are the best tuna fishermen in the world and the only true sincere conservationists and environmentalist fishermen.

We have proven this not by words, but by our actions, by net modifications, improved porpoise-saving methods and many, many other innovations.

We want relief now.

We want to survive.

Our industry of fishing is all our fishermen know.

Don't put us out of the fishing business.

Thank you.

Mr. LEGGETT. We are not.

Mr. FELANDO. I have a copy of my statement.

Mr. LEGGETT. It will be made a part of the record.

Mr. FELANDO. I will not read my entire statement.

I would like to talk about the U.S. tuna fleet and its production.

There are about 213 U.S. tuna clippers presently engaged in the U.S. tuna fishery located in the eastern tropical Pacific Ocean. In 1976, we estimate that about 334,000 tons of tuna was landed by all U.S. fishermen.

Of this total landing of tuna, about 320,000 tons could be attributed to these 213 U.S. tuna clippers.

I provide a table in my statement.

I won't go over it in detail.

It identifies the species and designates the tonnage in short tons.

We believe that for 1976, total fresh and frozen tuna imports came to about 302,000 short tons.

As I said, there are not duties, there are no restrictions with respect to fresh and frozen tuna in the United States, so we compete with every other fisherman in the world with respect to the supply of tuna.

Mr. LEGGETT. So we import more?

Mr. FELANDO. No.

We produced 334,000 tons in 1976.

Mr. LEGGETT. I see, including American Samoa?

Mr. FELANDO. The emphasis on imports is with respect to Albacore and light meat.

Ours is concentrated on yellowfin.

Mr. LEGGETT. With respect to yellowfin, you show that about 75 percent of that is domestically produced, while——

Mr. FELANDO. 196,000 for the domestic production and the foreign production is 72.9.

I am sure we can figure it out with the percentages.

An analysis of these statistics reveals the importance of the purse seine vessel segment of the U.S. tuna fleet to the supply of tuna to the U.S. consumer. It is the production of this part of the U.S. tuna fleet that is adversely affected by the Marine Mammal Protection

Act of 1972 (MMPA), and necessarily by the recent Federal court actions.

In 1976, there were about 139 tuna seiners and about 74 bait boats in the U.S. tuna fleet. But the real measure of fishing power is represented by the fish catch capacity of these vessels and not by the number of vessels. The frozen tuna carrying capacity of the 139 purse seine vessels was about 119,000 tons, while that of the 74 bait boats was only about 6,000 tons. This is why of the 320,000 tons of tuna landed by the 213 tuna clippers in the U.S. fleet, only 20,000 tons was caught by the 74 baitboats.

Thus, for 1976, the 139 seiners in the U.S. tuna fleet caught about 300,000 tons of tuna or about 89 percent of all tuna landed by U.S. fishermen and almost half of all tuna consumed in the United States.

This production resulted in about 15 million cases of tuna or about three-quarters of a billion cans of tuna. We estimate that each fisherman abroad these 139 tuna clippers provided enough canned tuna last year for about 42,000 fellow citizens.

So far in 1977, the Inter-American Tropical Tuna Commission (IATTC) reports that tuna production in the Eastern Pacific regulatory area for the tuna fleets of 12 nations is down 10,600 tons from 1976. All but four vessels in the U.S. tuna purse seine fleet are fishing in the Eastern Pacific.

Based upon reports compiled by National Marine Fisheries Service (NMFS), landings by the purse seine fleet in California is down about 50 percent in 1977 from 1976. Our estimates at the ATA is that at present the fleet's production is down 15,000 tons in 1977 from 1976.

We believe that these reports of reduced fish catches for the U.S. tuna fleet thus far in 1977 has been caused by the inability of the U.S. purse seiners to fish tuna associated with porpoise. From January 1 to January 25, the U.S. fleet was unable to fish tuna associated with porpoise. Since January 28, the fleet has been totally confused by the legal actions taken by the Circuit Court of Appeals in Washington, D.C. This confusion and uncertainty continues to this day. The ATA is still waiting for the Government to file its final regulations under the MMPA so that it can file its application for a General Permit.

Prior representations by Government attorneys in stating that a general permit would be issued at the earliest by mid-April was based on the view that the final regulations would be published by February 11, 1977.

Should the tuna fleet be denied to fish for tuna associated with porpoise until late April, then the fishermen will have only about 45 days of weather and sea conditions free of tropical cyclone and hurricane activity in the area from Baja Calif. to Guatemala—an important yellowfin tuna fishing area.

At present, the estimated production of yellowfin tuna for the international tuna fleet in the area of the Eastern Pacific designated by the IATTC and known as the Commission Yellowfin Regulatory Area (CYRA) is about 2,000 tons behind the 1976 production for a comparable time period. This indicates that the foreign fleets of 11 other countries are doing well. In 1976, the total catch of yellowfin tuna was about 204,000 tons. For 1977, the IATTC scientists staff can establish a quota of 210,000 tons for the CYRA. It also has the authority to restrict the quota to 175,000 tons or a lower amount.

In 1976, the yellowfin tuna closed season commenced on March 26; in 1975, the closure date was March 18. It is very reasonable to assume that the IATTC will establish a closure date for the yellowfin tuna season prior to the date when the ATA will be issued its general permit by NMFS. Such an occurrence would cause enormous damage to the U.S. tuna fleet.

Based upon reports made to the IATTC and also to the U.S. Commissioners to the IATTC, we believe that it is quite possible for the IATTC to reduce the size of the 1977 yellowfin tuna quota from 210,000 tons to a lower quota.

This action could be justified on the grounds stated in such reports, namely, that the unilateral action of the U.S. in prohibiting the fishing of tuna associated with porpoise has placed in jeopardy the objectives of a yellowfin tuna conservation program that has been in existence since 1966. Such a reduction in the yellowfin tuna quota would very severely damage the fleet's opportunity to remain economically viable for the remainder of 1977. Also, the reduced quota action by the IATTC would absolutely guarantee a closure date prior to the issuance of the general permit to the ATA.

Representations have been continually made to this committee and the courts that fishing tuna in association with porpoise constitutes only a small percentage of tuna consumed in the United States. This is a false and misleading assertion.

It is now abundantly clear that the Marine Mammal Protection Act, as now administered, threatens the economic survival of the U.S. purse seine fleet. As we have stated earlier, this U.S. purse seine fleet provides almost half of all tuna consumed in the United States and 89 percent of all United States tuna landings.

Conclusion: It is our opinion, the present administration of the Marine Mammal Protection Act, as interpreted by the Federal Courts, will destroy the most important supplier of tuna to the U.S. consumer—the U.S. tuna purse seine fleet.

Each year, the average catch of tuna associated with porpoise by this fleet represents 60–82 percent of the annual domestic landings of yellowfin tuna. For 1976, about 120,000 tons or over one-third of the total catch of the purse seine fleet was tuna caught in association with porpoise. For some vessels, the 1976 catch of tuna associated with porpoise represented almost 100 percent of their landings, for other vessels such catch represented a small percentage.

In addition, this dependence for each vessel will vary from year to year. Nevertheless, it is clear that the revenue derived from the catch of tuna associated with porpoise is absolutely necessary to the economic survival of the fleet. The many reports, affidavits, statements filed by the Government, industry and nonindustry experts in the recent administrative law judge hearings and in the Federal courts since May 1976 support this conclusion.

We also believe that the Marine Mammal Protection Act, as presently administered, is causing and will accelerate further removals of the few, large oceangoing fishing vessels this Nation has flying its flag in competition with foreign fleets in the tropical latitudes of the world's oceans.

Recently, I reviewed statistical tables prepared by the Shipping Information Services of Lloyds Register of Shipping and Lloyds of London Press Limited. This subcommittee should know that of the 195 U.S. fishing vessels of oceangoing size (45 meters in length and over) most of them are U.S. tuna vessels, and that of the 148 U.S. fishing vessels of 500 gross tons and over, almost all of them are U.S. tuna purse seiners. Thus, a forced transfer and sale of the U.S. tuna seine fleet for purposes of economic survival will effectively remove this country's most modern and efficient high seas fishing fleet.

We urge this subcommittee to reverse the destructive and doomsday course set by the Marine Mammal Protection Act for both the porpoise and the U.S. tuna fishery. We plead for an application of commonsense to the problems created by the Marine Mammal Protection Act. This act must be amended so as to provide that the fishermen of this country shall fish in accordance with a realistic and constructive management regime for both fish and mammals.

Thank you.

[The complete statement of Mr. Felando follows:]

STATEMENT OF AUGUST FELANDO ON BEHALF OF THE AMERICAN TUNABOAT ASSOCIATION

INTRODUCTION

I am August Felando, the General Manager of the American Tunaboat Association (ATA). The ATA is a nonprofit fishery cooperative association, formed without shares of stock, under the provisions of the Fish Marketing Act of the State of California. Its principal office and place of business is at One Tuna Lane, San Diego, California.

The membership of the ATA includes persons who own and manage 101 commercial fishing vessels documented under the laws of the United States. Such vessels, commonly known as tuna purse-seiners, utilize purse-seine gear to fish for tuna and tuna like fish. Our member vesels operate from ports located in California and Puerto Rico. Such vessels fish for tuna primarily in the Eastern Pacific Ocean, but some vessels also fish in the Atlantic Ocean. Exploratory ventures have been undertaken in the Central and Western Pacific in recent years.

DESCRIPTION OF THE U.S. TUNA FLEET AND ITS PRODUCTION

There are about 213 U. S. Tuna Clippers presently engaged in the U. S. Tuna fishery located in the eastern tropical Pacific Ocean. In 1976, we estimate that about 334,000 tons of tuna was landed by all U. S. fishermen. Of this total landing of tuna, about 320,000 tons could be attributed to these 213 U. S. Tuna Clippers.[1]

1976 U.S. TUNA CATCH

Species	Continental United States	Puerto Rico	American Samoa, Hawaii	Total
Yellowfin	141.5	54.2	0.6	196.3
Skipjack	64.6	32.9	8.0	105.5
Bluefin	11.7	0.2	0	11.9
Albacore	20.5	0	0	20.5
Total	238.3	87.3	8.6	334.2

---

[1] One ton of tuna provides 50 cases of canned tuna or 2,400 cans or, based upon the annual per capita consumption in the United States, enough to feed 266 individuals. No attempt is made to estimate the byproducts produced from one ton of tuna, such as pet food, oil and meal, cattle feed and vitamins.

We believe that for 1976, total fresh and frozen tuna imports came to about 302,000 short tons. By species: Yellowfin—72.9; Skipjack—128.2; Bluefin—0.8; and Albacore—100.0.

An analysis of these statistics reveals the importance of the purse seine vessel segment of the U.S. Tuna Fleet to the supply of tuna to the U.S. consumer. It is the production of this parts of the U.S. Tuna Fleet that is adversely affected by the Marine Mammal Protection Act of 1972 (MMPA), and necessarily by the recent Federal court actions.

In 1976, there were about 139 tuna seiners and about 74 bait boats In the U.S. tuna fleet. But the real measure of fishing power is represented by the fish catch capacity of these vessels and not by the number of vessels. The frozen tuna carrying capacity of the 139 purse seine vessels was about 119,000 tons, while that of the 74 bait boats was only about 6,000 tons. This is why of the 320,000 tons of tuna landed by the 213 tuna clippers in the U.S. Fleet, only 20,000 tons was caught by the 74 bait boats.

Thus, for 1976, the 139 seiners in the U.S. tuna fleet caught about 300,000 tons of tuna or about 89 percent of all tuna landed by U.S. fishermen and almost half of all tuna consumed in the United States.

This production resulted in about 15 million cases of tuna or about three-quarters of a billion cans of tuna. We estimate that each fisherman aboard these 139 tuna clippers provided enough canned tuna last year for about 42,000 fellow citizens.

So far in 1977, the Inter-American Tropical Tuna Commission (IATTC) reports that tuna production in the Eastern Pacific regulatory area for the tuna fleets of 12 nations is down 10,600 tons from 1976. All but 4 vessels in the U.S. tuna purse saine fleet are fishing in the Eastern Pacific.

Based upon reports compiled by National Marine Fisheries Service (NMFS), landings by the purse seine fleet in California is down about 50 percent in 1977 from 1976. Our estimates at the ATA is that at present the fleet's production is down 15,000 tons in 1977 from 1976.

We believe that these reports of reduced fish catches for the U.S. tuna fleet thus far in 1977 has been caused by the inability of the U.S. purse seiners to fish tuna associated with porpoise. From January 1 to January 25, the U.S. fleet was unable to fish tuna associated with porpoise. Since January 28, the fleet has been totally confused by the legal actions taken by the Circuit Court of Appeals in Washington, D.C. This confusion and uncertainty continues to this day. The ATA is still waiting for the Government to file its final regulations under the MMPA so that it can file its application for a General Permit.

Prior representations by Government attorneys in stating that a General Permit Permit would be issued at the earliest by mid-April was based on the view that the final regulations would be published by February 11, 1977.

Should the tuna fleet be denied to fish for tuna associated with porpoise until late April, then the fishermen will have only about 45 days of weather and sea conditions free of tropical cyclone and hurricane activity in the area from Baja California to Guatemala—an important yellowfin tuna fishing area.

At present, the estimated production of yellowfin tuna for the international tuna fleet in the area of the eastern Pacific designated by the IATTC and known as the Commission Yellowfin Regulatory Area (CYRA) is about 2,000 tons behind the 1976 production for a comparable time period. This indicates that the foreign fleets of 11 other countries are doing well. In 1976, the total catch of yellowfin tuna was about 204,000 tons. For 1977, the IATTC scientific staff can establish a quota of 210,000 tons for the CYRA. It also has the authority to restrict the quota to 175,000 tons or a lower amount. In 1976, the yellowfin tuna closed season commenced on March 26; in 1975, the closure date was March 18. It is very reasonable to assume that the IATTC will establish a closure date for the yellowfin tuna season prior to the date when the ATA will be issued its General Permit by NMFS. Such an occurrence would cause enormous damage to the U.S. tuna fleet.

Based upon reports made to the IATTC and also to the U.S. Commissioners to the IATTC, we believe that it is quite possible for the IATTC to reduce the size of the 1977 Yellowfin Tuna Quota from 210,000 tons or 175,000 tons to a lower quota. This action could be justified on the grounds stated in such reports, namely, that the unilateral action of the U.S. in prohibiting the fishing of tuna associated with porpoise has placed in jeopardy the objectives of a yellowfin tuna conservation program that has been in existence since 1966.

Such a reduction in the Yellowfin Tuna Quota would very severely damage the fleet's opportunity to remain economically viable for the remainder of 1977. Also, the reduced quota action by the IATTC would absolutely guarantee a closure date prior to the issuance of the General Permit to the ATA.

Representations have been continually made to this Committee and the courts that fishing tuna in association with porpoise constitutes only a small percentage of tuna consumed in the U.S. This is a false and misleading assertion.

It is now abundantly clear that the Marine Mammal Protection Act, as now administered, threatens the economic survival of the U.S. purse seine fleet. As we have stated earlier, this U.S. purse seine flet provides almost half of all tuna consumed in the U.S. and 89 percent of all U.S. tuna landings.

CONCLUSION

It is our opinion, the present administration of the Marinee Mammal Protection Act, as interpreted by the Federal courts, will destroy the most important supplier of tuna to the U.S. consumer—the U.S. tuna purse seine fleet.

Each year, the average catch of tuna associated with porpoise by this fleet represents 60-82 percent of the annual domestic landings of Yellowfin tuna. For 1976, about 120,000 tons or over one-third of the total catch of the purse seine fleet was tuna caught in association with porpoise. For some vessels the 1976 catch of tuna associated with porpoise represented almost 100 percent of their landings, for other vessels such catch represented a small percentage. In addition, this dependence for each vessel will vary from year to year. Nevertheless, it is clear that the revenue derived from the catch of tuna associated with porpoise is absolutely necessary to the economic survival of the fleet. The many reports, affidavits, statements filed by the government, industry and nonindustry experts in the recent administrative law judge hearings and in the Federal courts since May 1976 support this conclusion.

We also believe that the Marine Mammal Protection Act, as presently administered, is causing and will accelerate further removals of the few, large ocean-going fishing vessels this nation has flying its flag in competition with foreign fleets in the tropical latitudes of the world's oceans.

Recently, I reviewed statistical tables prepared by the Shipping Information Services of Lloyds Register of London Press Limited.[3] This subcommittee should know that of the 195 U.S. fishing vessels of ocean-going size (45 meters in length and over) most of them are U.S. tuna vessels, and that of the 148 U.S. fishing vessels of 500 gross tons and over, almost all of them are U.S. tuna purse seiners. Thus, a forced transfer and sale of the U.S. tuna seine fleet for purposes of economic survival will effectively remove this country's most modern and efficient high seas fishing fleet.

We urge this subcommittee to reverse the destructive and doomsday course set by the Marine Mammal Protection Act for both the porpoise and the U.S. tuna fishery. We plead for an application of common sense to the problems created by the Marine Mammal Protection Act. This Act must be amended so as to provide that the fishermen of this country shall fish in accordance with a realistic and constructive management regime for both fish and mammals.

Thank you.

Mr. LEGGETT. Thank you very much, Mr. Felando.

That is very helpful for the committee.

Restated, what you have indicated is that approximately 120,000 tons of tuna caught by the American fleet is caught in a situation with porpoise and assuming that we catch perhaps another percentage, probably 30 percent of all of the tuna that is consumed in the United States is caught in association with porpoise, either caught by Americans or caught by foreigners is something like that?

Mr. FELANDO. Yes, sir.

---

[3] Lloyds reported that there were 5,068 vessels in the world's fishing fleet that were of 45 meters in length and over, and 3,260 vessels that were of 500 gross register tons and over.

Mr. LEGGETT. Do you have any facts at this point with respect to tuna caught in association with porpoise by foreigners in the CYRA for the current year?

Mr. FELANDO. For 1977?

Mr. LEGGETT. Yes.

Mr. FELANDO. No; I don't, except this:

Mr. LEGGETT. Your educated guess would be what?

Mr. FELANDO. It is hard to say right now.

I wouldn't be able to guess on it.

I think there are around 24,000 tons of yellowfin tuna that have been caught up through the first week of February in the CYRA.

I think at this stage, without having the information that would be compiled by the International Tropical Tuna Commission, it would be a guess.

All we have is information from our vessel indicated that they are viewing, in fact, they are viewing with a little dismay the fact that foreign vessels are fishing tuna with porpoise.

It is hard when they record that one foreign vessel got 150 tons of tuna associated with porpoise while a U.S. vessel was watching.

Mr. LEGGETT. You indicate that the CYRA might be closed prior to the end of April when the American fleet would be allowed to fish under the existing law and regulations based on the most optimistic projections?

Mr. FELANDO. Yes; the reason for that is as you are watching the figures compared with last year and the total landings like the preliminary landings information is around 204,000 for 1976; the quota this year, permitted quota, can go as high as 210,000 tons, and we are really only 2,000 tons behind last year for a comparable period.

Mr. LEGGETT. What is the estimated closure date that you would expect this year, assuming that the American fleet continued to be limited as it is?

Mr. FELANDO. You are forgetting the foreign fleet is larger in size for this year and asking for the guess. I think the scientists should be considering early April, not a date in March.

Mr. LEGGETT. That would be assuming also that the quota would not be reduced from the 210,000 tons?

Mr. FELANDO. That is right.

That could very well be, that scientists watch very closely the size of the fish.

They measure the fish upon landings and, 2 years ago, we were very much concerned about the size of the fish that was being caught in the areas where most of the vessels are operating at now, which is the Central American area, so these are possibilities that the scientists might be concerned about, the fact that the greatest concentration of fishing power really ever in the history of the Commission is now somewhat located in a rather small geographical area, the CYRA.

Mr. LEGGETT. Would it be your view that any porpoise would be saved if that program were to be carried out, that is, if the 210,000 quota were to be fished by foreigners rather than the way it is normally fished?

Mr. FELANDO. I don't think that the U.S. fleet's ability to release the porpoise from the net is any greater than the foreign operators.

There are foreign operators that have American skippers and American men on the boat, but porpoise fishing is really a team effort.

If you saw the film, it would show that.

Yes; there is a great dependence on a few individuals, but porpoise fishing, more so than school fishing, is a team effort so, therefore, you have to have a lot of trained individuals besides just a skipper or head boss or chief engineer, so while the desire might be there on the part of the foreign fishermen I don't think they have the talent as yet to equal the ability of the U.S. fleet to release porpoises effectively.

Mr. LEGGETT. In light of the agreement at Managua, which has already been mentioned, where the tropical tuna group has agreed to study this problem and come up with some recommendations, and in light of the configuration that was imposed to the American fishermen, do you have information that the foreign fishermen are, in fact, taking action to attempt to moderate their take of porpoises?

Mr. FELANDO. I think you have to understand the foreign fishermen will try to duplicate the gear.

We see evidence of them purchasing small mesh, for instance, the Medina panel, but it is sometimes not just the purchase of the gear that effects the release of the porpoise. It is a combination of a lot of factors.

I think the skippers can answer that question better than I as to what factors achieve success, because we see evidence of foreign fishermen adopting that type of net.

They have to if they want to compete with us effectively.

I don't want to cast the foreign fishermen as just the ones who wear black hats because our basic belief is that there is a very strong economic motivation for fishermen, whether it is U.S. or foreign, to release the porpoise, not only for the long-term benefits, but for the fact that when you release porpoise effectively, that is, to release them alive, you can complete your set faster and then you are in a position to make another set, so I think there is desire.

We would like to see more action on the part of not only the fishermen, but foreign governments.

I just want to say that I believe that the foreign fishermen should not be cast as the bad character in this saga, but the fact is that the U.S. fishermen are just better trained, more experienced, and more talented so they are much more effective than foreign fishermen in releasing porpoise.

Mr. LEGGETT. One small question.

There was evidence that the average backtime of the *Elizabeth C.J.* was 13.38 minutes.

Is that a regular amount of time or an unusually long time?

How does that compare with our other statistics?

Mr. ALVERSON. Through the cooperation of the National Marine Fisheries Service, we made a call and checked the time.

It was 11 minutes for the fleet vis-a-vis the 13 I believe some odd seconds for the *Elizabeth C.J.*

Mr. LEGGETT. Would it be your opinion that that extra minute and 38 seconds had anything to do with reduced porpoise mortality?

Mr. ALVERSON. I don't know.

You will have to ask Captain Jorge because the last few seconds or the minute or two of these so-called sleepers could make the difference.

We are talking 8,500 sets a year and if you just say five more porpoise, you are talking 42,500 animals, so there is a distinct possibility.

Mr. LEGGETT. Captain Silva wanted to comment.

Captain SILVA. The vessel was the *Elizabeth C.J.* and the size is larger than the average, therefore he has got a lot more equipment that he is handling and if 11 minutes is average for the fleet and we are considering all different categories of boats, it seems to me a vessel his size, for a vessel that size, 13, whatever minutes with 11 for the fleet average, it seems like the timing is just about the same.

Mr. FELANDO. The charter required a helicopter capability.

At that time, there were only about five vessels having that capability in the U.S. fleet.

I believe only three vessels of the *Elizabeth C.J.* class are in the tuna fleet.

When you get a 750 fathom net versus a pull in of 620 fathom net, you do have a difference and I think Captain Silva is correct in his analysis.

Mr. LEGGETT. Mr. Oberstar.

Mr. OBERSTAR. Well, you certainly have given us a great deal of factual information and new light on this problem.

What steps would you recommend the committee take?

The last page of your statement says the act must be amended. How?

Mr. FELANDO. Well, we have some suggestions.

There are two basic sections in the act that deal with commercial fishermen, section 101 and parts of what is left applicable in section 111.

There is no question that we agree for a continued research program, that can be provided in section 111.

We suggest that section 101, however, establishes a degree of uncertainty about fishing that I think makes it impossible for people to plan their future constructing a tuna vessel like the *Elizabeth C.J.* for $4.5 or $5 million.

That is because that section says you may fish. There is no requirement in the law that says the Secretary will regulate fishermen.

He can do nothing and the fishermen would not be able to fish under this act.

That is because the language in section 101 where for the first two years from 1972 to October 1974, the act specifically provided that fishing shall be permitted subject to regulations in section 111.

We think that is the proper approach.

At the present time, we don't know whether we are going to—we are not fishing right now full score. In other words, we cannot use our net 100 percent of the time and that is because we have no permit and we don't know when we are going to get a permit, and that is what the act provides.

We think that condition should be corrected and we also believe that the permit procedures are such that I think they are ridiculously long.

I don't think they are necessary.

I think the Secretary or the Administrator under section 111 had a goal that was realistic for him for 2 years and that was to basically reduce porpoise mortality to the lowest practical level.

Mr. OBERSTAR. Is there any change you would recommend in the law, that it be changed to the lowest practical level?

Mr. FELANDO. Yes.

Mr. OBERSTAR. Rather than levels approaching zero mortality?

Mr. FELANDO. Yes, based on the interpretation of Judge Richey in May 1976, even when the regulations are promulgated and a permit is issued, a U.S.-flag fishing vessel is right now prohibited from fishing tuna associated with porpoise beyond the Eastern Tropical Pacific.

There is evidence of tuna associated with porpoise in the Central and Western Pacific.

There has been information that this is also true in the Atlantic and also in the Indian Ocean, but under Judge Richey's interpretation, and now presently agreed upon by the Circuit Court, and the way the agency is administering the act, we cannot develop any new areas outside the Eastern Pacific.

That is a tremendous detriment to have any U.S.-flag vessel in this fishery.

Mr. OBERSTAR. Let me ask each one of the captains this question.

In your judgment and fishing experience, is the basic requirement of the law an attainable one, to achieve levels of mortality approaching zero?

Mr. SILVA. If this is going to be a true possibility, it is difficult for me to say at this time.

I think we can probably some day get very close to this, but it is not happening today.

In looking back at all the improvements that we have done in porpoise rescue, none of these things happen overnight.

You know, if there are people here that think we have a magic wand, do we not.

We have worked toward the type net Captain Jorge used.

We didn't develop that overnight. We had people go up to Seattle and he spent a lot of months there.

Mr. OBERSTAR. Do you think you are approaching zero mortality in the work that you are undertaking?

Captain SILVA. I think that each time we meet a record we are approaching zero. I don't want to sound smart. We are talking about several thousands of porpoise that do get lost and if each time we are reducing that, if we are reducing the percentage, then we are approaching that area, but if we are called upon for meeting that week after week thing, saying, hey, you are not doing this, you are merciless and you are doing things needlessly and you are a wanton killer, then that doesn't make sense to us.

It is pretty degrading.

Mr. OBERSTAR. Do you think that the law needs to be changed, Mr. Felando, or would a more liberal interpretation of that law suffice?

Mr. FELANDO. It is pretty hard.

The section of the law that is causing the trouble has already been interpreted with the exception of the zero mortality section.

That has not been interpreted by the courts as yet.

I just think that that language in the law came in during a dialog on the Senate floor. There was never any opportunity for people to speak on that subject, as I recall, during the hearings, either on the House side or the Senate side.

That language came in on the Senate floor.

I really don't know what was in the mind of the drafters at that particular time, but I feel that that section of creating the idea that incidental kill has to be reduced to levels approaching zero mortality, I feel is just totally unrealistic and impractical.

Some people interpret that every year the amount taken or statistically established has to be lowered and if that is the approach taken, I don't see how we can guarantee that.

All we can guarantee is the best possible effort and that is it.

Mr. OBERSTAR. In fact, your track record has been that each year has been significantly lower?

Mr. FELANDO. Yes, from 1973 there has been a 55-percent reduction, from 1973 to 1976.

Mr. OBERSTAR. Captain, do you think you have reached the limits of technical excellence in reducing porpoise mortality?

Captain SILVA. I do not. I do not.

I think we are coming into another breaking and what with the inch-and-a-quarter mesh that has been used and with the super apron used by Captain Jorge which we haven't had time now to expand on because, in fact, we are prohibited from fishing, I think we are making progress.

I think last year, 1976, the results of the 20 vessels that experimented with the different type web is something to behold.

However, we can't expand on that because we are prohibited from fishing.

There is a prohibition on yellowfin tuna. It stops our business and what we are talking about.

Mr. OBERSTAR. You need to continue fishing in order to demonstrate the effectiveness of the new technology?

Captain SILVA. If we don't continue to fish, we won't be coming up here many more times, I don't think.

Mr. OBERSTAR. Realistically, Mr. Felando, what do you think your chances are for getting the other body to agree to a change in the law?

Mr. FELANDO. You are referring to the Senate?

Mr. OBERSTAR. Yes.

Mr. FELANDO. I guess we don't know until we try.

I don't want to predict it.

I hope people are listening to us.

Mr. OBERSTAR. No further questions.

Mr. LEGGETT. Thank you.

Mr. Anderson.

Mr. ANDERSON [California]. Thank you.

In restating your answer to my colleague here a moment ago, are you looking for amendments first, that would change the law to "the lowest practical level" instead of "levels approaching zero mortality," and, second, you want continued and expanded research programs and, third, shorter time of permit procedures which you feel are currently too long?

Are that basically the changes?

Mr. FELANDO. We would remove ourselves as the act provided in 1972–74, remove ourselves from the permit procedure.

We would be subject to regulations by the administrator.

Mr. ANDERSON [California]. So instead of shortening the time of permit procedures, you would remove yourself from them?

Mr. FELANDO. That is right, a return to what existed during the period 1972 through 1974.

Mr. ANDERSON [California]. These three amendments then are what you are looking for, Mr. Felando?

Mr. FELANDO. Yes, basically we are looking at section 101 that deals with commercial fishing and section 111.

Mr. ANDERSON [California]. Following up where you want us to go; when marine mammal act came back from the Senate side, and we were in conference on the wording that they had put in: "levels approaching zero mortality"; at that time the emphasis was on the word "levels" and everyone seemed to agree on that.

We were talking about lowering the level, which is exactly what has taken place.

Won't you have somewhat the same problem if you change the wording to "lowest practical level"?

I can see the same kind of vagueness in this new phase. We didn't know what the levels approaching zero mortality really meant, except that it was explained that it was a gradual lowering of the level, and that was how it would work.

It worked that way, except that it was interpreted by the courts differently.

Aren't you going to have the same trouble with lowest practical level?

Mr. FELANDO. I hope not.

The only answer I have is that we have a limited experience during which regulations were promulgated and enforced, based, I think, on that language.

That is the language that is contained in section 111.

So my answer to you is: You might be right, except we are looking back at the experience during that 2 years.

I think there is no question that we would have to incorporate the language contained in section 104(b) with reference to making sure that any regulations would take into account the population levels of the porpoise, fishery conservation programs, and the technical and economic feasibility of the implementation of the proposed regs.

I hope we wouldn't come into the same problem.

I am hoping that that language would be definite enough so as to allow a more realistic type of regulatory regime.

Mr. Anderson [California]. Thank you. Mr. Chairman.

Mr. Leggett. Very good.

Mr. Studds.

Mr. Studds. Mr. Cary, in your succinct statement you indicated that if the United States fleet is destroyed, that is no solution.

If the United States fleet is out of business no porpoises are saved.

Are you implying that if you stopped, foreign fleets would move in with no sensitivity to porpoises?

Mr. Cary. No.

I am looking at what our vessels are doing.

We are looking at progress and steady progress and progress in a reasonable time span.

This takes us into the area of what foreign governments would rule upon.

I don't know what the ruling would be.

I cannot demonstrate, therefore, that there would be any saving.

Mr. Studds. Well, in issues like this there are always compelling arguments on both sides.

The witnesses today presented excellent testimony.

I will commend you for it. And I pledge to work with the committee chairman and others to find a way to ameliorate the problems associated with this issue, but inevitably, we come to the matter of language, and that is going to be difficult because now the issue is further complicated by administrative rulings and court decisions, so it is going to take some fancy writing and a great amount of persuasion, and I think the committee should be committed to finding a legislative remedy.

I am a little disappointed that in issues like this, congressional intent isn't fully aired because frequently after the executive branch proceeds with drafting or promulgating rules, sometimes that intent is distorted and not fully carried out and we are back at the drafting board.

Therefore, I hope that in future cases we can more clearly spell out congressional intent so there is not a great deal of confusion and contradiction.

I do not have any more questions.

Mr. Leggett. Thank you.

I do not know how much you pledged there, but I think it is the view of the committee that we want to achieve these goals and we want to achieve them without giving people a heart attack.

On the other hand, I don't think we are going to be able to achieve the goals we intend unless we keep everybody kind of uncomfortable.

Mr. Studds. I have one request of Mr. Felando.

If you could submit some suggested language for amendments to the committee, at least we have then something to look at.

Mr. Felando. Yes, I will.

Thank you.

Mr. Leggett. Mr. Bonior.

Mr. Bonior. Mr. Felando, I was looking over the U.S. Department of Commerce cruise report, and I am interested in knowing if you or any of the other panel members can shed some light on the new technological breakthroughs, the super apron, and the 1¼-inch-mesh webbing.

How pervasive is it?

How many of the fleets that we have are capable of this?

Mr. FELANDO. I have all kinds of experts.

Captain Jorge, who has operated the *Elizabeth C.J.* is here.

I believe of the 96 very large vessels, at least in October before the administrative law judge, the testimony was that 91 of the 96 vessels purchased sufficient small mesh or fine mesh, the type that is required to have the two panels on the super apron, and they are awaiting orders.

That was done.

We made that commitment before the proposed regulations came out and that was because during 1976 we conducted a 20 vessel experiment of what we call the bold contender system.

And the bold contender system in 1975 came back home with very good results, but the captain of the vessel did not know whether this was due to what we call two panels plus an apron, or just two panels of fine mesh, so with the assistance of the government or the Porpoise Rescue Foundation, 20 vessels conducted an experiment in 1976, 10 vessels with just two panels of fine mesh and 2 vessels with the entire bold contender system.

The *Elizabeth C.J.* was one of those vessels that conducted an experiment and it did have an observer on the trip prior to the one that that cruise report is based upon.

At that time the results were very good on the cruise but there were defects in the system and suggestions for changes were made.

What I am telling you is basically the system of the bold contender was evolved out of prior experiments in 1974–75; that based primarily on the reports that came out of the bold contender system and now the *Elizabeth C.J.* cruise, regardless of whether the regulations required it or not. I believe our fleet, the larger vessels, the new vessels in excess of 600 tons or so will be equipped with that mesh.

Now, I have given you a long answer.

However, I would like to have Captain Jorge speak on that and I would like to have Franklin Alverson provide you with more information if you desire.

Mr. ALVERSON. First of all, you mentioned 213 vessels.

What we are talking about here are purse seiners and in 1976 there were approximately 124 vessels that took certificates of inclusion to fish for yellowfin in association with porpoise.

So we are talking about 124 vessels.

Mr. BONIOR. What do you mean in association with porpoise?

I am not as familiar as I shoulda be.

I have seen that term used and often.

Mr. ALVERSON. Basically, we are fishing for yellowfin and skipjack in the tropical oceans.

Skipjacks are rarely found. Yellowfin are found with porpoise, which we would call associated fish, or as school fish.

The regulations state that if you intend to catch any fish in association with mammals, you have to have a certificate of inclusion, and for the yellowfin fleet, it is called the purse seine fleet for the yellowfin fish; if you don't ever intend to fish for yellowfin, you don't need it.

So, roughly, 124 took the certificate last year.

Of those, about 95 large vessels, depend to a significant amount upon yellowfin associated with porpoise.

At the current time, I think Mr. Felando has already said that all of the vessels have pledged orders for small mesh webbing, and as the vessels are returning from sea, they are installing small mesh.

I think right now that we have approximately 33 or 34 vessels that have the webbing already installed.

As they come in and the webbing is available, the remainder of the fleet will install it.

Mr. BONIOR. To attain the results that this attained, the report lists a number of things that must be done, small mesh webbing and some other things, inflatable rafts, speedboats—at what point do you think the majority of the fleet will reach the point so that hey will be able to obtain results similar to that in this report?

Mr. SILVA. It is a long question.

Will you ask again, just exactly what you are asking?

Mr. FELANDO. How long before the fleet has this?

You might ask him whether on the next trip he will have the same results.

Mr. SILVA. This is difficult to guarantee by anybody.

The only thing I can point out on the 20 vessels that experimented last year, I think 1975, the average, 30 percent of all the sets were made by the fleet, 30 percent with no loss in those sets, that is, sets on porpoise with tuna.

In 1976, it was 40 percent, or at least close to it, 39 percent or 38 percent.

With these 20 vessels in the experimental trip with new webbing, it was 65 percent no loss, so it indicates to me that we are on the right track and that we do have another breakthrough.

Can you add to that?

Mr. JORGE. Yes; I think we are.

I have worked a lot of nets, but I think this is the best one that I have worked with, this panel.

I think that is one of the reasons we had such a good success last trip.

We put a lot of effort into it.

We changed and modified quite a few times.

The first trip, this is our second trip, we got it down to right now, and I feel really comfortable with it and we can reduce the mortality today.

Mr. LEGGETT. If that panel is mandated under the regulations for early deployment in all seiners that will carry it, how long will it take to get the ships outfitted with that kind of panel?

Mr. JORGE. Well, Mr. Chairman, I have two boats, and after my brother took the *Elizabeth C. J.* with the new panel, then I went out the last trip when we made the movie and he talked so good about it, so I ordered new webbing, and it has been in process.

In fact, they told me it should be done.

It was in January, so I sent a telegram down to Panama. It has been very hard to get it.

The *Maria C.J.* was close and was supposed to pick it up because it was supposed to be done.

I wanted to put the panel on the *Maria C.J.*; the way it looks, it will take quite awhile to get the webbing.

Mr. LEGGETT. Is the webbing ordered in Panama?

Mr. JORGE. The ones we wanted, yes.

Mr. FELANDO. There are no U.S. manufacturers that we know of that can supply the needs of the fleet.

The other thing is when you deal with a vessel like the *Elizabeth C.J.*, you cannot—I want to disabuse you of the idea that it is very simple now with the dynamics of the *Elizabeth C.J.* net to suddenly transfer it to another vessel.

In other words, nets are not uniform as such.

The basic idea is there, but you have the problem of water dynamics with the net. Not all vessels are equipped with twin screws. 5,600 horsepower main engine to effect the backdown when maybe you are practically dragging a bucket of water, so to speak, so therefore you have problems in your backdown procedure which, last year, accounted for 97 percent of the release.

Then, there is a period of adjustment by the skipper in the handling of his vessel and the net, so I want to disabuse you of the idea that it is simplistic transfer from the *Elizabeth C.J.* to all of the vessels.

There will be a time of transition here.

In the cruise report, you noticed there were some problems with the school fishing, so this has to be developed.

The other thing is not only the equipment, the fine mesh, we have a problem with floats, so we have a lot of things that have to be considered in making this transition, but it is already underway and one of the major problems is the delivery of the net and the equipment associated with the panel.

Mr. BONIOR. Thank you.

Mr. LEGGETT. Thank you.

Mr. Mannina.

Mr. MANNINA. Thank you, Mr. Chairman.

You said there would be a time of transition.

All factors considered, how long a time of transition for installing a system similar to the *Elizabeth C.J.*?

Mr. FELANDO. Assuming we have all the webbing and corks?

Mr. MANNINA. Assuming the time to acquire all the items as well as taking care of the gear dynamics, when could the system be operational.

Mr. FELANDO. I would like Captain Silva and Captain Jorge to speak on this.

The idea of installing the nets, if you have it available, you are talking about a week for installation at the most.

What I am talking about is the transition out at sea so that the fellow knows how to handle the new panel and the apron and I would like to have the two Manuels talk to that.

The time period, pinning me down, I would say I don't see why anyone shouldn't have the equipment by June, assuming that we have favorable deliveries.

Mr. Silva. I think once the equipment is installed that within a complete trip that a vessel should know where it is with it.

You might have to, when he comes in, make some changes, make some corrections and, hopefully, on his second time out, if there are corrections that have to be made, that they will be resolved then, and then there will not be too many problems with that vessel.

The experience with some of the 20 boats that went out, there have been a couple that weren't as successful as others; as a matter of fact, not too good at all.

The *Proud Heritage*, for instance, that is one of the vessels I own, and it was one of the experimental boats, the captain took the vessel out, made five sets, and made the adjustment by coincidence or luck or good seamanship, and they worked out just perfect for him.

Mr. Mannina. Just after lunch, someone suggested to me that the Defense Department's list of vessels which would be called up in a national emergency situation included numerous vessels in the tuna fleet.

Are you able to confirm that?

Mr. Felando. All I know is World War II, and, of course, the whole fleet in San Diego was converted into the color gray within weeks.

I do not have any direct information.

We do provide a lot of information to the Defense Department now.

We have now, however, to my knowledge, had any connection with any request of the nature that you brought up.

I have not had any conversations like that.

Mr. Mannina. Thank you.

Mr. Leggett. Thank you, Mr. Mannina.

Mr. Spensley?

Gentlemen, I think those are all the questions we have at this point.

Thank you very much.

Mr. Felando. Thank you very much.

I am sorry that not all of you saw the movie. The movie describes the tuna and porpoise within the net and going outside the net and maybe at some time we will be able to show some of the other film that Mr. Thompson photographed on the *Elizabeth C. J.* during that cruise.

Thank you again.

Mr. Leggett. Mr. Milton Kaufmann, president of Monitor, Inc., on behalf of the Connecticut Cetacean Society, Fund for Animals.

STATEMENT OF MILTON KAUFMANN, ON BEHALF OF THE CONNECTICUT CETACEAN SOCIETY, FUND FOR ANIMALS, INTERNATIONAL FUND FOR ANIMAL WELFARE, U.S.A.

Mr. Kaufmann. Mr. Chairman, I am not sure which is most endangered.

Mr. Leggett. Your statement will appear in the record.

Mr. Kaufmann. Thank you, sir.

I am president of the monitor consortium of 22 environmental, conservation and animal welfare groups. I am speaking today on behalf of four of the organizations in the consortium: the American Littoral Society, the Connecticut Cetacean Society, the Fund for Animals, the International Fund for Animal Welfare, USA. and the National Parks and Conservation Association, and the Chesapeake Chapter of the American Littoral Society.

We are pleased to note that this committee has no proposed amendments to the MMPA of 1972 before it at the present time.

We assume that the purpose of the hearing is oversight of how well the Department of Commerce, the Marine Mammal Commission and the tuna industry are doing to discharge their responsibilities under the MMPA.

This committee is to be commended for the role that it has played in making it clear to the executive branch of the Government and the tuna industry that Congress insists that the provisions of the act be carried out.

We sincerely hope that now, at long last, as progress is being made in the direction of achieving the act's goal of porpoise mortality approaching zero, that ill advised efforts to amend the act are not made.

The world is watching to see what happens to the act now that the tuna/porpoise provisions are being actually brought into play for the first time in 3 years. At two very important international conservation meetings held in November and December of 1976, the U.S. Government was urged to fully enforce the MMPA and the Congress was urged to maintain the integrity of the act and to resist all attempts to weaken it with specific reference to the porpoise protection provisions of the act.

May I ask that the resolution of the Fourth International Congress of the World Wildlife Fund, held in San Francisco, U.S.A., November 29 through December 1, 1976, be entered into the record and that note be taken that this resolution was endorsed by the Survival Service Commission of the International Union for the Conservation of Nature and Natural Resources at its meeting at Kino Bay, Mexico, the following week?

Mr. LEGGETT. Without objection, it will be included in the record.

[The material was not available at time of printing.]

Mr. KAUFMANN. Mr. Chairman, we would recommend that the committee consider, at the earliest possible time, sending a letter from the committee to the Chief Investigator of the Inter-American Tropical Tuna Commision, Dr. James Joseph. He is the individual charged by the Inter-American Tropical Tuna Commission with preparing an international research and development program to require international coordinated effort.

The Inter-American Tropical Tuna Commission will hold a special meeting prior to July 1, 1977 to address the tuna/porpoise problem.

Further, we hope that the State and Commerce Departments will begin tuna/porpoise protection bilateral negotiations very soon.

Dr. Joseph is in New Zealand at the present time; and it is our understanding that not a great deal of progress is made at the moment toward preparing for the meeting to take place before the 1st of July.

We would specifically urge you to consider in such a letter encouraging him to take full advantage of the work which has been done specifically, the Marine Mammal Commission and the Industry, so that the program that he prepares can dovetail with the U.S. program, other than conceivably their trying to reinvent the wheel, when it has already been done.

I feel that a letter from your committee would have a salutary effect in moving them forward expeditiously.

Mr. LEGGETT. Very good. We will do that.

Mr. KAUFMANN. Thank you.

Any move by the Congress to reduce the strength of the present law will obviously weaken the hand of the U.S. delegations working on both the IATTC and bilateral arenas. We have commented at earlier hearings before this committee of the negative effect U.S. Government foot dragging on enforcement of the MMPA tuna/porpoise protection provisions has had on U.S. efforts to achieve a 10-year moratorium on commercial whaling at the IWC meetings.

With respect to the proposed Department of Commerce tuna/porpoise fishing regulations for 1977, we support the Environmental Defense Fund's December 17, 1976, Opening Brief and Exceptions to the Recommended Decision of the ALJ, dated January 28, 1977.

However, the Connecticut Cetacean Society believes that no permits should be issued this year allowing incidental take of porpoise and the Fund for Animals maintains that the quota should be drastically reduced this year in order to move rapidly and significantly towards the goal of almost zero mortality.

We share Dr. Norris' view that the 1977 fishing regulations should be designed to reward boats with low porpoise mortality and penalize boats with high porpoise mortality. We believe the majority of the skippers would support this concept.

We are very pleased with the tuna's industry commitment to provide a purse seiner available year around to support research and development work.

This decision is a major step forward. The scientific workshop being organized by the Marine Mammal Commission is also very constructive. Both of these actions are responsive to recommendations we have been making for several years.

The third positive development is the highly successful *Elizabeth C.J.* behavioral cruise which clearly demonstrated that a skillful crew with the most advanced gear can bring mortality rates down to 0.005 porpoise killed, per ton of yellowfin tuna as compared to the 1975 fleet average 400 times greater.

But this is no time for complacency. We are only now beginning to make some progress because of continuing pressure from environmental groups and Federal court decisions. If the Act or regulations are weakened, industry and government will revert back to their original attitude that the problem of porpoise kill will go away and not have to be solved.

We regret that pressures are apparently being brought to bear on Congress to weaken the act by amendment. We think this is an inconsistent and irresponsible action compared to the highly responsible position the Monitor environmental groups have consistently taken during the past 4 years, and our recent position as reflected in the EDF brief.

I have a few additional remarks I would like to make that are not in my prepared statement, sir; and I will be brief.

I want to address the point that has already been raised about the applicability of the National Environmental Policy Act, the proposed transfer of purse seiners to foreign flag.

We asked one of Monitor's lawyers, Mr. Leonard Meeker, a very distinguished lawyer who at one time was the senior lawyer in the State Department and has handled cases for the Monitor Consortium, to investigate the applicability to the question of proposed transfer of foreign-flag purse seiners.

In summary, he responded to the letter and in summary he said as follows:

"In the light of the determinations made by Congress in the Marine Mammal Protection Act and of the facts that have been developed concerning the consequences of unrestricted tuna fishing without regard to incidental kill of porpoise, it would seem that a decision leading to such unlimited tuna fishing would constitute a 'major Federal action' within the meaning of the National Environmental Policy Act. As indicated earlier, a decision to approve the transfer of American tuna boats to foreign registry could lead to widespread transfers of vessels and to their fishing without regard to the restrictions adopted by the Department of Commerce under the Marine Mammal Protection Act. Such transfers would be for the purpose of avoiding application of the Department of Commerce regulations and for the purpose of conducting tuna fish operations free of any such restrictions."

Mr. Chairman, may I ask that the entire letter from Mr. Meeker be included in the record?

Mr. LEGGETT. That will be included in the record at this point.

[The following was received for the record:]

CENTER FOR LAW AND SOCIAL POLICY,
Washington, D.C., February 17, 1977.

Col. MILTON M. KAUFMANN,
U.S.A.F. Retired, President, Monitor, Inc., 1346 Connecticut Avenue N.W., Washington, D.C.

DEAR COLONEL KAUFMANN: You have asked my views as to the applicability of the National Environmental Police Act to a possible decision by the Maritime Administration of the Department of Commerce to approve the transfer to foreign registry of American vessels engaged in fishing for tuna in the Pacific Ocean.

Federal law requires the approval of the Secretary of Commerce—

"* * * to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States." 16 U.S.C. § 808.

The issue of transfer of American tuna boats to foreign registry has arisen because of regulations adopted under the Marine Mammal Protection Act of 1972 to limit the number of porpoises (marine mammals) that may be taken incidental to tuna fishing operations. The Marine Mammal Protection Act applies to the activities of American citizens wherever they are carried on, including activities on the high seas.

Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332, requires all agencies of the federal government to prepare a detailed environmental impact statement on "major Federal actions significantly affecting the quality of the human environment." The precise question you have raised is whether a government decision to approve the transfer of American tuna boats to foreign registry would constitute such a major federal action.

A Department of Commerce decision to approve such transfers could remove the entire American tuna fishing fleet from the jurisdiction of this country and from the operation of the Marine Mammal Protection Act. If this should occur, these vessels would be free to fish outside of United States jurisdiction without regard to any limitations on the incidental taking of porpoise. Such fishing operations could lead to very large kills of porpoise and to consequent changes in the ecology of the ocean areas that constitute their habitat. Prior to the adoption by the Department of Commerce of regulations limiting the taking of porpoise incidental to tuna fishing, the Marine Mammal Commission established by Congress had warned that the total kill and serious injury levels of porpoise were "unacceptably high". *See Committee for Humane Legislation, Inc.* v. *Richardson*, 540 F.2d 1141 (D.C. Cir. 1976).

The litigation just cited was instituted by several environmental and animal conservation organizations that were concerned with the substantial harm being sustained by the porpoise population and by the consequences this would have for the marine ecosystem. Section 2 of the Marine Mammal Protection Act, 16 UU.S.C. § 1361 *et seq.*, set forth the Congressional findings and declaration of policy concerning the importance of marine mammals to the environment.

In the light of the determinations made by Congress in the Marine Mammal Protection Act and of the facts that have been developed concerning the consequences of unrestricted tuna fishing without regard to incidental kill of porpoise, it would seem that a decision leading to such unlimited tuna fishing would constitute a "major federal action" within the meaning of the National Environmental Policy Act. As indicated earlier, a decision to approve the transfer of American tuna boats to foreign registry could lead to widespread transfers of vessels and to their fishing without regard to the restrictions adopted by the Department of Commerce under the Marine Mammal Protection Act. Such transfers would be for the purpose of avoiding application of the Department of Commerce regulations and for the purpose of conducting tuna fishing operations free of any such restrictions.

Yours sincerely,

LEONARD C. MEEKER.

Mr. KAUFMANN. The point made by Mr. Meeker, plus the point that was developed resulting from Mr. Mannina's questioning this morning relating to U.S. national policy and, lastly, the point that has already been alluded to of national security considerations seems to us to be three points that—as a minimum, would greatly slow down the transfer of purse seiners in foreign registry and might very well preclude any such transfer.

I would like to say a word about one of the agencies in the U.S. Government that has played a very key role in working toward solution of the tuna/porpoise problem, in fact an agency which has been extremely constructive on all marine mammal protection problems.

The organization is the Marine Mammal Commission. We feel that of the three agencies of the Government that have had responsibility since 1972 in administering the law, that the most constructive role by far has been by the Marine Mammal Commission.

I wanted to get this in the record because it is our understanding that some consideration has been given by the new administration to reductions eliminating commissions and we think it would be catastrophic for elimination of the Marine Mammal Commission or reduction of its functions.

I would like to comment on a comment that was made at the outset today that the tuna/porpoise issue is a classic confrontation between environmentalists and business enterprise. The statement was made that the conservationist group demand that the tuna fishermen immediately stop killing dolphins, even if it means drastic curtailment or cessation of fishing.

We would like to refresh the Committee's memory or the position that has been historically taken with complete consistency by the monitor groups on this issue. In every tuna/porpoise forum in the last few years, we have gone on record that significant progress must be made each year to move toward the goal of a mortality approaching zero. We have insisted on, one, an annual quota which must be significantly reduced each succeeding year.

Two, we have insisted on an observer on every boat.

Three, an annual multi-million-dollar program of research and development be with emphasis on acoustics and behavior, existing gear and techniques and new improvements that will permit economically successful catching of yellowfin tuna without putting nets around the porpoise at all.

At no time, Mr. Chairman, and distinguished members of the committee, have we recommended that there be a total cessation of setting on porpoise nor have we had any desire to drive the tuna industry to the economic wall or bankruptcy under the foreign flag. We have recognized from the outset that it was absolutely essential that American fishermen continue to fish so that working with the Government, it would be possible to develop the technological breakthrough that is the ultimate resolution of this problem.

I must confess to a degree of shock today, in terms of what I feel to be a feeling of some members of the committee that the point has been established that industry, to remain viable, there must be significant amendments of the act. We have only begun to get progress toward resolution of this problem after the 2-year period of grace was over.

During the 2-year period of grace, there was no significant movement toward solution of this problem. Both the Government and the industry paid lipservice to the need to solve the problem, did not put significant resources into this.

The record is replete with the fact that there was a very inadequate application of resources, money and manpower into this problem during the 2-year period. If we go back to a grace period, we will have stopped forward movement toward solution of this problem.

At the same time, it was not until we took the Federal Government into court that a quota was established and it was not until a quota was established that significant resources began to be applied to solving this problem. We would be very much concerned with the kind of amendment that we discussed today, that we would be back in square 1 with this problem.

So I think that completes my remarks, Mr. Chairman, and I would be happy to try to respond to any questions.

We thank you very much for inviting the monitor groups to appear before the committee today.

Mr. LEGGETT. Very good.

We always appreciate your constructive response to the challenges in this particular area and we can talk about the 2-year grace period or the last 2 years.

I think the last 2 years we have had considerable progress and hopefully over the next 2 we will have even more progress; and I do think you are right in many of your observations; certainly, we would not be here today were it not for the environmentalists' concern with respect to the survival of the species and to see the movie that we saw; to think of worthless destruction of the creatures that we saw in the movie is not a nice concept to contemplate.

I do believe that we have come a ways.

The committee was not thinking about quotas, 2 years ago, until we could handle the matter of the dolphins and, in that regard, I think we had a cleavage in opinion of the Monitor groups and the members of the committee.

Now we are—I think we are all of the view that perhaps the only way we can get a handle on this matter is through some kind of quota procedure and have those quotas apply on either a per boat or per area way and some kind of reasonable way that we could monitor.

The committee has been of the view for at least three-quarters of the year that we ought to have maximum implementation of an observer program. This was not part of the regulations. It was part of the so-called McCloskey amendment, the legislation which moved out of the subcommittee but stopped.

So I think that is an area we could get into. There is no doubt about the fact that we spend a small amount of Federal and domestic dollars and environmental dollars, environmental dollars, on this over-all research problem up through the past year; and it is my hope that we can spend adequate amounts of funds over the next several years and adequate boats to accomplish that research is a firm industry contribution from which we can build.

We have got some insight as to new gear, which is improving all the time; and our big problem now would appear to be how to get that gear and how to get trained people out to the sea at the earliest practical date.

With respect to exploring alternative methods of acquiring the fish. I guess the fleet is doing that right now. They are not fishing on the schools of fish that are asociated with the porpoise. They are fishing on other schools and other kinds of fish besides yellowfin.

The committee is concerned that the regulations that are being formulated: exactly which numbers they will incorporate or which conditions of the ALJ recommendation they will include, we do not know and I do not think anybody really knows.

I think we could perhaps generally conclude that many of the restrictive measures recommended will be included and perhaps others. But we find ourselves in the unfortunate situation that, while we are moving ahead, and while we have had rather dramatic success in some of our pilot programs, that as a result of our existing regulations and checks and balances upon those regulations to interrelation upon the public and of course that, if we can believe the testimony that has been presented to the committee so far, the quota of yellowfin tuna in the CYRA area will be fished essentially this year by foreigners, perhaps resulting in an undue take of immature fish and ironically perhaps the take of porpoise larger than would be otherwise taken, were a reasonable regulation allowed and put into effect at a rather early date, to allow fishing on mammals associated with yellowfin tuna by the fishermen.

I am sure this matter is a cause of concern by monitor groups as it is for the Chair.

Do you have any observations on that?

Mr. KAUFMANN. Yes, sir, Mr. Chairman.

Those monitor groups that associated with and represented by the environmental defense fund, did support and support today an interium regime to extend between the present time and the time that the final regulations are promulgated and in effect; an interim regrime in consonance with the proposed 1977 tuna-porpoise fishing regulations, amended as recommended in ERF's brief the ALJ.

We have no quarrel with this. We support this concept.

Mr. LEGGETT. Very good. I appreciate that statement.

Mr. Oberstar?

Mr. OBERSTAR. No questions.

Mr. LEGGETT. Mr. Anderson?

Mr. ANDERSON. No questions.

Mr. LEGGETT. Mr. Bonior?

Mr. BONIOR. No questions.

Mr LEGGETT. Mr. Mannina?

Mr. MANNINA. No.

Mr. LEGGETT. Mr. Spensley?

Mr. SPENSLEY. No questions.

Mr. LEGGETT. We are letting you off quite easily.

Mr. KAUFMANN. I do not know if that is total failure or total success, sir.

Mr. LEGGETT. Well, with respect to your last statement, which I will not repeat, I would hope that we could explore that further and perhaps in some private meetings.

Mr. Kaufmann, thank you very much.

Now, I think we will call Mr. Mulligan.

STATEMENT OF JOHN MULLIGAN, EXECUTIVE DIRECTOR, TUNA RESEARCH FOUNDATION, ACCOMPANIED BY KAREN PRIOR, CONSULTANT, PORPOISE RESCUE FOUNDATION; AND FRANK ALVERSON, RESEARCH DIRECTOR, PORPOISE RESCUE FOUNDATION, SAN DIEGO, CALIF.

Mr. MULLIGAN. Thank you, Mr. Chairman.

With your permission, Mr. Frank Alverson, the research director, and Ms. Karen Prior, our consultant, will join me for our presentation.

Mr. LEGGETT. Your statement will appear in the record as if you fully read it.

[The following was received for the record:]

STATEMENT OF KAREN PRYOR

My name is Karen Pryor. I presently live in New York City. I am a biologist and a writer and have been serving as a consultant to the Porpoise Rescue Foundation since September of 1976. My pertinent field of expertise is porpoise behavior, and especially the behavior of spinner and spotted porpoises, having worked extensively with thesee species as a trainer and a researcher for eight years in Hawaii. I've published a book, "Lads Before the Wind," (Harper and Row 1975) and numerous scientific papers about these and other kinds of porpoises.

In October of 1976, at the oversight hearings being held here then, Dr. Kenneth Norris of the University of California at Santa Cruz asked me if I would join the behavioral research expedition then being planned by the Porpoise Rescue Foundation. Dr. Norris and I have worked together extensively in the past on porpoise research problems. I joined the expedition as a member of the scientific investigative team under a temporary staff appointment to the University of California at Santa Cruz.

I joined Research Vessel *David Starr Jordan* at Manzanillo, Mexico on November 5th when the ship put in to refuel, partway through the cruise. We went to sea and met the *Elizabeth C.J.* and I was able to observe the fishing techniques and to dive in the net and observe porpoise behavior. You have heard the very excellent results of this cruise. In December and January I have been speaking to scientific and environmental groups and making press and media appearances to share my experiences and I find people universally surprised and excited to learn that what seemed to be a hopeless problem is instead a very hopeful situation indeed. In 1975 the fleet was losing an average of 130 porpoises per 100 tons of tuna. By the fall of 1976 this average was down to 90 porpoises per 100 tons of tuna. The *Elizabeth C.J.* got it down to less than two porpoises per hundred tons. On this cruise she caught nearly 1000 tons of tuna and lost 16 animals and about a dozen of these may have been due to the activity of scientists in the nets. I may say I have seen this progress coming. In 1975 the fleet was achieving zero sets (sets of the net in which not one porpoise was lost) about 15 percent of the time. Then last 19 vessels went to sea to test new net modifications, the major feature of which was the so-called "Bold Contender" system, which makes an apron or spillway to guide the porpoises out, and these boats had about 40 percent zero sets.

The *Elizabeth C.J.* was using an even further improved version called the super-apron, and was achieving almost all zero sets during the cruise. I had, as I say, foreseen this level of improvement but I had not idea it would be possible for any ship so soon; in fact I think many of the scientists were surprised.

Now this success was not due entirely or even mostly to the net modifications. The *Elizabeth C.J.* is a magnificently equipped ship and her captain and crew are supremely skilled and efficient. I have never seen such a complicated operation conducted at sea, and I have never seen any operation conducted at sea with such perfection. The chase and the setting of the net are difficult procedures and they were carried out superbly; in fact it is quite a thrilling sight. The next is not easy to handle; nets in my experience are wilful, tricky creatures, and a great deal depended on the *C.J.* captain's skill in using wind, waves and currents to help keep the net distended, on using speedboats to prevent folds and buckling in the net, and on aligning and straightening out the backdown area and the super-apron properly. It is also important to have the forces on the net so well balanced that the cork line can be raised or sunk at will, to prevent losses of fish should the tuna stray into the backdown area. The C.J. lost only about 1.7 percent of her tuna catch during backdowns on this trip.

Furthermore the combination of pairs of eyes we had on this trip produced behavioral information which may have been known, previously, by this person and that, but which had not been put together and made understandable and useful. For example, after backdown is completed and all the porpoises have been seen to leave the net, some animals are sometimes to be found lying on the net in the backdown area. These animals have often been presumed to be drowned. Dr. Norris and James Coe, the net technician, by getting into the water with face plates, found that these animals were alive and well, and were exhibiting a sulking behavior which I have often seen in my training tanks. By waiting five minutes, until the sulking animals have to come up for air, you can let them out of the nets easily. Another problem is the occasional stray animal or animals that are deep in the net, away from the backdown area, and go unnoticed until the net is drawn in. Jim Coe points out that you can easily tell if any such animals have been left behind by sticking your head under water and listening; they whistle all the time.

So it turns out to be important to have a person checking the porpoises from below the water surface before backdown is terminated. There is a real hazard from sharks in the net. Our photographer was actually attacked once. So Coe, who performed this task for the *C.J.*, worked from a small rubber raft; he was also, with some practice, able to use this raft to help herd reluctant animals out of the backdown apex to freedom.

Perhaps my own principal contribution as a scientist on this cruise was that I was able to verify the fishermen's observations that the porpoises exhibit learned behavior.

There are a number of ways to take advantage of this ability to learn. For example, some animals are reluctant to turn around and face the sunken corkline they must cross, and have to be guided out, sometimes backwards. I have suggested the fleet-wide use of an inexpensive pinger or sound source located outside the net at the backdown area, a sort of freedom bell, to be associated with the spot where the animals first feel themselves to be free. I would hope that after one or two experiences this welcome sound might help animals turn around and orient towards the corkline and open water.

I would like to point out that we cannot expect all 137 vessels in the fleet to become instantly as good as the *Elizabeth C.J.* The cruise of the *Elizabeth C.J.* was in effect an experiment conducted under ideal conditions. Furthermore, the large matter of understanding the fine-tuning of the net, and the smaller matter of understanding the behavioral tendencies of the porpoises, both take training. For example, I would estimate that the training of a skilled raft man could only be done under actual fishing conditions, and would be about the same task in time and difficulty as turning a novice horseman into a good working cowboy.

As far as fleet-wide gear improvement goes, this too will take time. Every boat is different and every net is different; the installation of fine mesh panels and variations of the super-apron have to be custom-tailored, as it were, to each net, and then modified in practice, if necessary.

Motivation is also very important. James Coe feels that the single most important rescue technique is to continue backdown until it is certain that every live porpoise is out of the net. This would eliminate many of the small losses of two or three or five animals which add up so fast statistically; and it requires that crews think about porpoise life-saving techniques with the same responsible care they give to their own life-protective bear and methods on board ship. I am confident that the necessary training and motivation will be able to continue taking place throughout the fleet. When I joined the *Elizabeth C.J.* the scientsts and the fishermen had already been out at sea working together under strenuous conditions for about a month. I was delighted to observe that there was a *more* than cooperative spirit. Real mutual respect and understanding had grown up between the two groups, and I stepped into a flourishing working relationship. I would especially like to take this opportunity to thank Captain Manual Jorges, who is present here, for the courtesies and cooperation extended to me. Captain Jorges ran an extra set, which was not a profitable fishing set and which meant about three hours of gruellingly hard work for everyone, just so I could make as many behavioral observations as posible, and it was invaluable to me.

Perhaps the greatest breakthrough of the *Elizabeth C.J.* cruise was that a lot of public and private understanding and communication grew out of it, not just between fishermen and scientists, but also among the industry, the environmentalists, the government and the public. I think this is going to be of inestimable and growing benefit.

FUTURE RESEARCH

I hope that circumstances this year will permit the mounting of larger and longer research cruises. I personally am very anxious to work on Dr. Norris' suggestion that ways be developed to guide porpoises out of the net before backdown, to be used in emergencies when broken winches or other delays allow the net to start collapsing. I would like to apply my trainer's eye to totally naive animals in the nets, because we have special techniques in captivity for handling panicky porpoises which might be applicable. I want to observe hand-release of animals that do get entangled, if only to pass on what trainers know about not handling a porpoise where it is ticklish. We need to continue looking at long-range notions for separating and netting tuna without encircling the porpoises at all. And as consultant to the Porpoise Rescue Foundation I hope to contribute whatever advice I can on industry-wide training of net-handling and porpoise handling techniques.

Mr. MULLIGAN. I would appreciate it, since I do not intend to read it, but would like it to appear in the record.

Karen Prior has a statement to make, and also Frank Alverson, with the Living Marine Resources. Karen Prior is a marine behavioral scientist, a consultant to the Porpoise Rescue Foundation.

Mr. Chairman, if I may, I will introduce myself.

I am John P. Mulligan. I am president and chairman of the Board of Porpoise Rescue Foundation, San Diego, Calif.

I am also executive director of the Tuna Research Foundation, Terminal Island, Calif.

The Porpoise Rescue Foundation, as you know, was formed in December 1975, to promote and support research studies, education, training and activities relating to a reduction of porpoise mortality and serious injury in the course of commercial fishing for yellowfin tuna.

I testified before regarding the format of the foundation, how it is structured and how we operate. Frank Alverson will be able to address for you and the committee members just exactly what the programs were in 1976, and the success of the research programs.

I think the record of the Porpoise Rescue Foundation's activities and results to date demonstrate effectively, in my opinion, the leadership and the fiscal commitment of the industry to this program. Specifically, the industry has committed itself to implementing an ambitious program for 1977 to include:

(1) $1.7 million is dedicated to a massive gear experimentation of the fine-mesh systems tested in 1976;

(2) $351,000 of direct industry contributions to continue cooperative observer programs with the NMFS, gear orientation and experimentation work, fleet education programs, behavioral studies, and other scientific and biological work.

Finally, the dedication of a tuna vessel to porpoise research in 1977, with the parameters, including such matters as pre-backdown release methods, tagging and tracking research, differential mortality studies involving age and sex surveys, numbers and verification of counts for porpoise, area distribution and other factors; and a crew training program.

I believe that the Porpoise Rescue Foundation has made and will continue to make significant contributions to the resolution to the tuna/porpoise problem.

At this time, Mr. Chairman, if I may have Karen Pryor, who joined the research cruise of the *Elizabeth C.J.*, give you and the committee her observations and comments. Frank Alverson is also available to answer any questions regarding any other programs that were completed successfully by the Porpoise Rescue Foundation in 1976.

Thank you, Mr. Chairman.

Mr. LEGGETT. Thank you very much.

Ms. PRYOR. I am Karen Pryor from New York City. I am a biologist and a writer and have been serving as a consultant to the Porpoise Rescue Foundation since September of 1976. My pertinent field of expertise is porpoise behavior and especially the behavior of spinner and spotted porpoises, having worked extensively with these species as a trainer and a researcher for 8 years in Hawaii.

I would like to share some of my experiences as a member of the scientific research staff.

I will skim through the things that have been well covered by other people; but I hope having a viewpoint of at least one of the scientists may be illuminating; and I regret very much that I am the only one in the scientific party who was available for this hearing; because currently James Coe, the chief scientist, and Dr. Norris, I am sure, have a great deal to tell you.

Mr. LEGGETT. Your salary is paid by whom?

Ms. PRYOR. During the time of this cruise, I was a temporary staff member of the University of California at Santa Cruz. I was a government employee for the 3 weeks that I was at sea.

Mr. LEGGETT. Who are you employed by now?

Ms. PRYOR. By the Porpoise Rescue Foundation as a consultant. It is a running contract to advise and consult on a number of matters.

At this time, I was there strictly for the purpose of being behavioral researcher. I joined in New Mexico. This is about halfway through the cruise. There was a kind of ship of scientific personnel. Some went down for the first part of the cruise and some with the second part.

We went to sea and met the *Elizabeth C.J.* and I was able to observe the fishing techniques and to dive in the net from underwater as well as above water.

We heard, of course, the excellent results of this cruise. It was really quite remarkable.

Going from an average loss by the fall of 1976 of 90 porpoises for 100 tons of tuna to less than two porpoises per 100 tons. I may say I have seen this progress coming.

The numbers of zero set were going up fast in 1975 to 1976, particularly when we heard the Bold Contender system was introduced, which makes a sort of apron or stairway to guide the porpoises out. It is my feeling that psychologically they have a much easier time crossing a horizontal bar rather than a vertical one, even if they are the same distance under water; but that is just my hunch.

Mr. LEGGETT. What is your hunch again?

Ms. PRYOR. That the porpoises have an easier time crossing a horizontal barrier. That the net, that the apron spills out. They can go over that; but the vertical barrier seems to be more of an obstacle to them.

Anyway, I had really no idea that this level of improvement would come so fast for any ship and I think that many of the scientists were surprised. I do not feel that the success was due entirely to the net modifications. The *Elizabeth C.J.* is a magnificantly equipped ship, and her captain and crew are supremely skilled and efficient. I have never seen such a complicated operation conducted at sea, and I have never seen any operation conducted at sea with such perfection.

The chase and the setting of the net are difficult procedures and they were carried out superbly; and as you saw in the film, it is an exciting sight. The nets are willful, tricky creatures and a great deal depended on the *C.J.* captain's skill in using wind, waves and currents to help keep the net distended, on using speedboats to prevent folds and buckling in the nets and on aligning and straightening out the backdown area and the superapron properly.

It is also important to have the forces on the net so well balanced that the cork line can be raised or sunk at will, to prevent losses of fish should the tuna stray into the backdown area.

The *C.J.* lost only about 1.7 percent of her turn catch during backdowns on this trip.

The combination of pairs of eyes we had on this trip produced behavioral information which may have been known previously by this person and that, but which had not been put together and made understandable and useful. You have heard in the film the shipper action. This is a behavior I have seen often in my training films. I think of it is as sulking. It had to be put together through biologists and fishermen working together.

Another problem is the stray animals that are deep in this net, away from the backdown area, and go unnoticed until the net is drawn in. James Coe points out that you can easily tell if any such animals have been left behind by sticking your head underwater and listening—they whistle all the time.

It seems important to have a person checking porpoises from below the water surface before backdown is terminated. There is a real hazard from sharks in the net. Our photographer was actually attacked once, so Coe, who performed this task for the *C.J.* worked from a small rubber raft and he was also, with some practice, able to use this raft to help herd reluctant animals out of the backdown apex to freedom.

I think perhaps my own principal contribution as a scientist on this cruise was that I was able to verify the fishermen's observations that the porpoises exhibited learned behavior. There were half a dozen observations I made of different schools that convinced me as a porpoise trainer that they were ahead of us. They knew what was happening.

Mr. LEGGETT. By that you mean that the porpoise have been caught before and they knew how to get out?

Ms. PRYOR. I think they did. They knew for example where the background areas are. During the setting of the net, they will take up stations quite calmly. I was surprised at how calm they were. In the middle of the net and as far from the boats as they can get before backdown starts, before backdown started, they went to the backdown area. It reminded me of cattle waiting at the gate. They knew where they were supposed to go. They were cooperating.

I think there are a number of ways to take advantage of this.

For example, some animals are reluctant to turn around and face a sunken cork line. Even though they will go over it, they will go over it backwards; and I am suggesting the fleetwide use of an inexpensive tinger or sound force located outside the net at the backdown area, a sort of freedom bell, to be associated with the spot where the animals first feel themselves to be free.

You can see the changing behavior when you know they are free. We saw this on the film—the splashes as they get out of the net. I would hope after one or two experiences that this sound would be welcomed and would help animals turn around and orient toward the cork line and open water.

I am sure a lot more small things like this can be put together to make each release easier for each boater and for each animal. I am sure there are a lot more of these little things.

We have, of course, discussed—and Captain George and Captain Silva made a clear statement that it will take a little time for every boat to get as good as this. The cruise of the *Elizabeth C.J.* was a model ship. Fine tuning the net, not just having the net, but having it distended perfectly with the skill of the *C.J.* is a large matter. I would estimate that the training of a skilled raft man could only be done under actual fishing conditions; and would be about the same task in time and difficulty as turning a novice horseman into a good, working cowboy. It cannot be done in a weekend. Your improvement will take time. These aprons have to be custom tailored to each net. I think the captains made that point.

Motivation is also very important.

James Coe feels that the single most important rescue technique is to continue backdown until it is certain that every live porpoise is out of the net, and as Frank Dobson pointed out, this will eliminate the little losses, because they add up statistically. It does require that crews think about porpoise lifesaving techniques with the same responsible care they give to their own life-protective gear and methods on board ship.

I am confident that the necessary training and motivation will be able to continue taking place throughout the fleet. When I joined the *Elizabeth C.J.*, the scientists and the fishermen had already been out at sea working together under strenuous conditions about a month. I was delighted to observe that there was a more than cooperative spirit. Real mutual respect and understanding had grown up between the two groups, and I stepped into a flourishing relationship. I would especially like to take this opportunity to thank Captain Manuel Jorges for the courtesies and cooperation extended to me.

Captain Jorges ran an extra set, which was not a profitable fishing set and which meant about 3 hours of grueling hard work for everyone, just so I could make as many behavioral observations as possible; and it was invaluable to me. It was really invaluable to me and I may say there was a spirit of courtesy and I think it was the first time they ever had a female scientist under these circumstances. It was really a pleasure to work on the *C.J.*

Perhaps the greatest breakthrough of the *Elizabeth C.J.* cruise was that a lot of public and private understanding and communication grew out of it, not just between fishermen and scientists, but also among the industry, the environmentalists, the Government, and the public. I think this is going to be of inestimable and growing benefit.

I have a brief remark, and I cannot speak for the entire scientific team; everyone who has been out there has a year's worth of what they would like to do. I would like to share what I would like to do.

I think I am really interested in some more understanding of the tuna/porpoise relationship. It looks like a feeding symbiosis. It looks like the tuna follow the porpoise because they feed on the same size prey.

One can actually see that with the porpoise feeding on the top and the tuna feeding underneath, this increases the efficiency. I think the porpoise are passive partners in this arrangement.

I would like to work on Dr. Norris' suggestions that ways be developed to herd porpoises out of the net before backdown, to be used in emergencies when broken winches or other delays allow the net to start collapsing.

I would like to apply my trainer's eye to totally naive animals in the nets, because we have special techniques in captivity for handling panicky porpoises which might be applicable. I do not see any.

I would like to observe hand-release of animals that do get entangled, if only to pass on what trainers know about not handling a porpoise where it is ticklish. I was interested—and this is purely research and not applied research in the chance to look at subgroups in the net; you can see the mothers, fathers, in their groups of three or five. I would like to get another look at that.

And as consultant to the Porpoise Rescue Foundation, whatever work that I am going to do this year, I would hope to contribute advice on industrywide training in porpoise handling.

Thank you.

Mr. LEGGETT. Thank you very much.

You indicate that we are getting more and more sets with zero take, which is significant.

Did you come to any conclusions as to the reasons why, why more zero sets are not made? If this is your only experience out there——

Ms. PRYOR. I would like to look at some sets where things did not go perfectly before answering that question. I could only guess now.

Mr. LEGGETT. Did you look at the logs that are available from your observers?

Ms. PRYOR. I have not looked at the observer logs.

Mr. LEGGETT. It might be helpful in continuing your research if you do that.

Ms. PRIOR. Yes; I think it is an excellent idea.

Mr. LEGGETT. And perhaps we could come up with some conclusions.

Mr. Mulligan, we will note you are leaving.

Thank you very much.

Let me ask you this:

From what you saw, other than the physical problem of acquisition and deployment of nets similar to what you saw in the *Elizabeth C.J.* and the training of crews comparable to what you saw there, do you find any problem in expanding the *Elizabeth C. J.* procedures to other ships?

Ms. PRYOR. It seems to me that it should be possible for any well equipped ship to do a pretty good job. The problems I would perceive would be ships that do not have enough power to securely maneuver these vast nets, especially in rough water. It may be a little harder for some of the smaller ships to do this.

Frank, what do you think?

I do not really feel equipped to answer that.

Mr. ALVERSON. Let me just say that one of the programs that the Porpoise Rescue Foundation has for 1977, extension program, to assist people in making the switch over to the *C.J.* system. I think the people that have it in their nets now have problems and are in a learning process. I think we can take advantage of it and I think the transition can be made; and I believe one of the captain's five sets for his vessel—I do know that there have been vessels that have had two and three trips and are still having problems with their gear, and maybe they are unique to that vessel or that net; but I think the transfer can be made over the course of this coming 1977 season if we can ever go fishing on porpoise.

If we do not get any experience on fishing of porpoise, I guess if there is any one viably economically around, then we will in 1978, we will do it then.

Mr. LEGGETT. How many ships did have what we call the Bold Contender gear generally deployed upon them?

Mr. ALVERSON. As near as I can make out, there are between 33 and 35 vessels which have fine mesh systems. I say fine mesh systems because I think they go all the way from a double strip panel, up to nets that have an apron and a chute and then you have the modification which we call the super apron and there may be other variances around.

Mr. LEGGETT. Unfortunately, the results that I saw concerning the Bold Contender gear were not exactly the same as the original experiment in that the original experiment is 1.2 porpoise per set and the subsequent data, as I recall, did not support that kind of a result.

Mr. ALVERSON. Well, I cannot remember at this point in time what the Bold Contender did itself. I do know that in 1976, with our 20-vessel experiment, that the kill rate experienced by those vessels, many of which were operating outside the line where fishing conditions were difficult, was less than half of the conventional gear, and I think that is a big jump in the right direction.

Mr. LEGGETT. Mr. Oberstar.

Mr. OBERSTAR. Based on your experience, do you feel that the industry is in compliance with the law working toward production of porpoise mortality in levels approaching zero?

Ms. PRYOR. The *Elizabeth C.J.* is. She is really the tip of the iceberg of several years of effort and motivation of a wider and wider range of fleets.

Mr. OBERSTAR. Do you have any information there to substantiate the statement accompanying Colonel Kaummann's presentation that from 1958 until the 1972 act, there were 7 to 8 million porpoises killed in connection with the tuna fishing; is that a reliable figure?

Ms. PRYOR. Sir, I am very leery of all these population estimates. They all seem soft as melted butter to me. I feel very unhappy about all of them.

Mr. OBERSTAR. Do you feel that the Marine Mammal Commission and all the other organizations of the Federal Government are approaching the study of porpoise populations in a proper manner as fast as they reasonably can, or is there something lacking?

Ms. PRYOR. Well, if you are talking about history, the behavioral crews that—as far as what we are doing now, I wish that the NMFS decisions were coming along a little faster along with everyone else. I see acceleration which seems to be promising. People seem to be getting together faster and faster. I am hopeful.

Mr. OBERSTAR. It certainly appears to be the key to this issue of determining what are the optimum population levels. Until we do have that data, we are going to continue to have problems with the porpoise, it seems to me, unless we change the law.

Do you see any need for changing the law, as suggested in earlier testimony by the American Tuna Boat Association?

Ms. PRYOR. Since I have absolutely no legal training, I really do not feel equipped to say——

Mr. OBERSTAR. That does not disqualify you.

Ms. PRYOR. I notice people have opinions.

Mr. OBERSTAR. It is probably a great asset in writing law.

Ms. PRYOR. If that is the only way to go, then I think that is the way to go. If that is the only way to go. I hesitate to commit myself.

Mr. OBERSTAR. There are those who would pretend that unless we have the zero population level provision in the law, there will not be any realistic pressure on the industry to continue its work to reduce mortality.

Ms. PRYOR. I disagree.

I think the act provides plenty of opportunity for being rewritten in such a way that the industry is still under constraints to perform and improve without being quite as punitive as it seems to be now.

Mr. OBERSTAR. Is zero mortality unnecessary or an unreasonable goal in light of the possibility of other restraints that could be applied?

Ms. PRYOR. Zero mortality is awfully extreme.

Are we going to kill one or five? It is a very difficult term to work with.

If you were putting this many sheep through a gate in the course of a year, I do not think you would have zero mortality. It seems like an arbitrary—it seems indeed it has been shown that it can be interpreted dangerously rigidly.

Mr. OBERSTAR. Can you provide the committee information on whether the mortality incidental to tuna fishing is greater than or less than natural mortality?

Ms. PRYOR. Oh, no; I would just be guessing. It is additional to natural mortality. No matter how you look at it. The natural mortality is certainly going on. But how it stands in ratio to natural mortality, I really could not say.

Mr. OBERSTAR. What about the—excuse me; go ahead.

Mr. ALVERSON. I think the panel of experts that met last July, August, and put out a report in September indicated that the natural mortality component of the total mortality for the offshore spotter and the eastern spinner, and I believe the whitebelly spinner is considerably larger than the fishing mortality. Those numbers can be derived from that report.

Ms. PRYOR. To be simplistic, if you have an animal, as you do here, that probably lives 25 years, that is its life span, then every 5 percent of those animals would die from old age. This is not approaching that natural level; no, not at all.

Mr. OBERSTAR. Is it reasonable to assume that with the changeover to new techniques developed by the *C.J.*, and the additional interesting suggestion that you offered, some further inducement should be found to help these remaining animals out of the nets.

Ms. PRYOR. This is a minor—there are many, I am sure, small improvements that could be made of this nature. Yes? Excuse me?

Mr. OBERSTAR. If we can continue reducing those mortality levels, you think there is room for substantial improvement?

Ms. PRYOR. Oh, absolutely. I feel very confident and enthusiastic about the overall ultimate reduction to very, very minor practical levels.

Mr. OBERSTAR. The film that we saw last year showed fishermen actually in the water helping free the porpoises.

Were they doing that during your experiment?

Ms. PRYOR. Well, the super apron and proper handling of the porpoises, not pressing them too fast, just moving them gently, results in releases in which that is not necessary. They are not entangled because they did not get flushed into the nets, and they are working and everything is running smooth except in very rare accidental instances as you saw in this movie, one animal with a tooth stuck in the net. You might have to go down and unhinge him. But I do not see it and I envision normal sets by all the fleets, generally operating at a point where this kind of backbreaking profit——

Mr. OBERSTAR. It was interesting to observe that there were certain individual animals that had experience previously, they seem to be able to find their way out.

Did others follow them? Did they set an example?

Ms. PRYOR. No; the schools, groups of porpoises moved like herds of cattle as a unit. There are subgroups in there, mothers and babies and little bunches of teenage babies but leadership is not exactly what you see.

Mr. OBERSTAR. The serious ones would move first and would the whole school be influenced to turn with them?

Ms. PRYOR. You cannot tell that. This school moves as a school; and they would all go over to the backdown area. Who made the decision? I could not possibly tell you.

Mr. OBERSTAR. I have observed spear fishing in the Caribbean tropical waters and observed fish turning like an Army marching unit. Someone says, right flank, and a whole group of submarines turn. It was all very interesting.

Ms. PRYOR. The structure of schooling fish is slightly different than the behavior. This is going to be more like cattle—the behavior of cattle; but it is more of a unit than a leadership situation. They are more like a school of fish than an Army sergeant with a platoon.

Mr. OBERSTAR. Thank you very much for a very highly interesting presentation.

Mr. LEGGETT. Mr. Anderson?

Mr. ANDERSON. Thank you, Mr. Chairman.

I have no questions, but Ms. Pryor I do want to thank you for an excellent presentation.

Mr. LEGGETT. Mr. Bonior.

Mr. BONIOR. I had some questions for Mr. Mulligan, just basically informational questions on something about the foundation, and maybe the two witnesses here could help me out, or you, perhaps. Let me try some out here.

OK, in Mr. Mulligan's statement, he said the policy is set by a board of directors, which consists of nine members.

Who is on this board of directors?

Mr. ALVERSON. There are three processors, three representatives of vessel owners and three union officials, which represent the crew.

Mr. BONIOR. The statement also said that the Porpoise Rescue Foundation was formed in conjunction with the cooperative agreement of the National Marine Fishery Service and the Marine Mammal Commission.

What kind of agreement is the cooperative agreement?

Mr. ALVERSON. There was a memorandum of agreement and perhaps John Hodges could assist us on that.

Mr. HODGES. Yes; thank you, Congressmen.

I am, among other things, the general counsel to the Porpoise Rescue Foundation, and also counsel to the Tuna Research Foundation and also have been acting as counsel in certain matters for the Tunaboat Association.

The cooperative agreement was written up at a time when it appeared that greater coordination was needed with respect to research. The cooperative agreement was designed to bring about that coordination and avoidance of duplication for the research and the parties agreed to do everything in their power.

It was really a memorandum of understanding to really do everything in their power to work together, to avoid duplication and to make sure that the information was gathered for research, got out to all interested parties.

Following up on that agreement, then the Porpoise Rescue Foundation was formulated. I will go back just 1 second to the hearings in 1975, before the National Marine Fishery Service.

It was suggested at that time in San Diego, before the National Marine Fishery hearings, the 1976 regulations, that the industry came forward with a seven-point program which included, among other things, a commitment of funds for accelerated research and an agreement that would set forward the mechanism for the disbursement of those funds. And then in the summer of 1975, after the cooperative agreement was signed, the industry did set up the Porpoise Rescue Foundation which was the vehicle for handling the research funds that had been committed by the industry for purposes of 1976.

Then during 1976, the bulk of the porpoise rescue money was put toward a program of testing the—you heard a number of vessels that have gone out to test the Bold Contender system and the modified Bold Contender system.

The funds from the porpoise rescue system were devoted toward that particular project. There have been a number of other projects that the Porpoise Rescue Foundation has been involved with, and Mr. Alverson can explain. It is an ambitious program, and we think it has been a very promising one.

In addition, I might add that the 1977 program, which includes the $1.7 million to be devoted for this broad-scale experimentation, was brought about after a meeting last—early last summer, of the ad hoc advisory committee to the Porpoise Rescue Foundation, which is a very broad-based group that includes industry, environmentalists, observers, from the environmental community, the government, and many others.

I think there are about 30 to 35 people involved in that particular meeting.

Mr. Bonior. Thank you.

Mr. Leggett. Thank you, Mr. Bonior.

Mr. Mannina?

Mr. Mannina. No.

Mr. Leggett. Mr. Spensley?

Mr. Spensley. No questions.

Mr. Leggett. Very good.

Let me ask you this. Now, Mr. Alverson, of the items that affect porpoise mortality, gear would be No. 1, that would alleviate mortality. I guess the expertise of the captain and the expertise of the crew would be major factors, including the traffic, weather would be a very adverse factor in survival of porpoises. How about the area where they are fished from?

Do you find that the mortality is associated with the area, whether they are inside or outside CYRA?

Mr. Alverson. The area may be associated with the weather, and I think that there may be a difference between "naive" porpoises—in other words, porpoises which have not been set on as much as in older ones of the fisheries. That is an area in which our porpoise people hope to explore this coming year.

Mr. Leggett. That goes back to the learned behavior that the two witnesses talked about?

Mr. Alverson. Right; Karen.

Mr. Leggett. How about the size of the boat?

Mr. Alverson. I am not sure that we have run that correlation to the sea. I do not believe that is an important item, as much as the gear and the skills of the captain and the crew.

It is a possibility, but I think you might not detect it amongst all of the other variables.

Mr. Leggett. How about day or night?

Mr. Alverson. People do not set at night. There are and have been sets in which people constantly refer to as sundown sets. I believe the *Elizabeth C.J.* had several sets in that category, and he managed to run them off very successfully.

Once again, this may be a difference of skills of the parties involved. I believe most of the vessels are equipped with a searchlight, which they know how to use to direct the fish away from the backdown area, so that they can effectively work. I think we may be talking here about a learning curve or degree of skill among the individual fishermen and this is one that can be resolved by training.

Mr. LEGGETT. Now, you have certain captains, like Captain Jorge and Captain Silva, who appear to be very good at catching tuna and not injuring porpoises, and, as a result, you use them on some of these studies.

Likewise—have you identified certain captains and crews which consistently do not perform well?

Mr. ALVERSON. We have not identified such people that consistently do not perform well, but on the basis of our cooperative observer program with the National Marine Fishery Service last year, we did identify seven captains, three on the outside of the CYRA, and four that operated inside, that had mortalities significantly above average, and this problem has been addressed by the Captains Panel. The foundation analyzed all the trips that these seven captains had participated on.

We met in December and looked at certain criteria, kill per ton, kill per set. The number of animals in the set and other factors, and then individually looked at each captain's set log record, to determine why these people had problems.

We listed the reasons for the problems, and recommendations on how to alleviate them, and have, since that time, started to contact these captains to say: Look, here is why you had a problem, here is wha you are going to have to do to resolve it.

Now, thus far we have caught two of our skippers before the first of the year, we are monitoring the fleet's activities to await the return of five more.

In addition to looking at what the skipper's problems were, we also analyse the trip's performance for mechanical problems and things of that nature, which really fall in the making of the owner's responsibility.

In addition to contacting two skippers, we have contacted the owners of two vessels with some suggestions as to how they could help their captain reduce porpoise mortality. The suggestions have been followed, and one of them was as simple, if you increase the depth of your net by several strips, it would greatly increase the volume of the net and this would make it a more effective fishing on porpoises.

It is our understanding that this year Mr. Enright made one set, caught approximately 20 tons of fish, and I think its porpoise mortality was one. It is a small sample, but it is a step in the right direction.

Ms. PRYOR. When you say "we," are you talking about the Porpoise Rescue Foundation?

Mr. Alverson. This work was all done by the Porpoise Rescue Foundation. The captains' panel is an internal part of the foundation, and in that manner it has access to the confidential information that is collected.

We analyze it in confidence, and we contact the captains and the owners also in confidence.

Mr. Leggett. I recognize you would like to go back to 1970 and 1972, or 1972 and 1974, assuming we could not go back to that condition of the law, do you think that a gross quota for all boats is fairer than a per-boat quota?

Mr. Alverson. I think one would have to anlyze this very, very carefully. But I look at it in this way.

We have insurance policies. They are based on a large mass and if the individual had to insure his future by plucking the money in the bank, most of us could never cut it on that basis. I think we sort of have an analogous situation in the fleet, where a first-class skipper could have a problem on one set or certain conditions occur in which he has a mortality which might put him over his number for the year, and an individual boat quota puts that man out of business for the year, which is rather harsh, I think, as a penalty, and I think as the last resort that is the way one would go. But I feel that the cooperative approach, where we have a total which allows us to work with people that have problems and it gives them some insurance that they are going to be there today and tomorrow—if you have a fellow that consistently has a problem and perhaps he is going to have to be excised from the system and not allowed to run a vessel——

Mr. Leggett. What they do in the insurance business is, if you have people that consistently cause problems, their premiums go up.

Of course the just quota for boats, directed proportionally in their avoiding porpoise mortality.

With regard to that occasional skipper that runs into a problem, I am sure that you are aware of that old adage in golf, called the "Mulligan."

Mr. Alverson. He has left.

Mr. Leggett. We could give everybody a "Mulligan." I think if we did take out some of the big problem sets, from the statistics where we know exactly what act of God or phenomenon contributed, I think that our numbers that we have for averaging might be considerably better.

Mr. Alverson. I do not think there is any doubt about that, and if there was some way, perhaps, of filtering or analyzing a man's trip record to see what situations, occurred, one might make a judgment based on facts, and perhaps, as you say, raise someone's premium.

Mr. Hodges. I would like to add about the boat owner.

The suggestion was made during the administrative hearings by some witnesses. The subject of a boat-by-boat owner is something that we would have to look at very, very carefully, because, while from a—you have a question as to how you are going to provide that quota up—on what basis are you going to give everybody a flat number?

Will you do it on a basis of a kill, on the basis of historical performance, or somebody in the previous year?

A rate basis. And, in addition, you have a number of problems like this.

Also you have the—you treat the large and small boats the same. So I am suggesting that this is an area that has to be looked very, very closely before we end up with a system that could be inequitable, really, for everyone, and it just has.

Mr. LEGGETT. Is it not a fact that the small boat rate of kill per ton is larger than the large boat?

Mr. HODGES. I will have to defer to Mr. Alverson. My impression is that small boats are not normally the problem.

Mr. ALVERSON. Well, it depends on what we mean by small vessels.

If we mean those of less than 400 tons carrying capacity, built prior to 1961, I think their aggregate kill last year was extremely low, because they just didn't set on any porpoise. This is going to be one of our problems on a vessel-by-vessel quota, in that if you just put a sheer number on it, let us say that you say 500, and if you exceed that you are out of business.

Now, if I had a man that killed 500 porpoises on one set, when he caught, let us say, 100 tons of tuna, and another man that might kill 1,000 porpoises over the course of the year, but he caught 5,000 tons of tuna while doing it, in association with porpoise, I would say he is a much more efficient fisherman than the guy that goes out and clobbers porpoise one set.

So one must be very careful in approaching this individual basis for a vessel. There is a lot of hookers in the system.

Mr. LEGGETT. Hooker is what we are trying to get you to use, but you will not use them. You are using a net. All right.

Ms. PRYOR. May I make a comment on that?

I realize it is an immensely complicated thing. I am very much against the use of net reinforcement. It does not work entirely well.

I wish there were—not plans for the—limitations for all the boats, but some system of rewarding the boats that do a good job.

Mr. LEGGETT. It works out the same way. You reward them by letting them fish a little bit longer.

Ms. PRYOR. Yes, without penalizing the ones.

I just would rather look on the plus than the minus.

Mr. ALVERSON. Do you put the quota on a captain or on the boat? That is another part of the system, because, let us say that I am—it is very complicated.

Mr. LEGGETT. You might put it on the captain, the crew, and the boat.

We have computers that work all this out. They solve all of the apportionment of our public works fund where needed.

Mr. ALVERSON. If I could make one comment.

A little earlier Colonel Kaufmann stated that there was no progress for several years, and suddenly things have started to move.

I think really what he was indicating was that there was no apparent progress that he could see, and perhaps the progress was not up to his and other people's expectations.

But let me say this, that the *Elizabeth C.J.* crew was the culmination of 5 long hard years of work by the Government of the United States, certain individuals such as Dick McNally and Jim Coe, who put their hearts into it, certain skippers who worked closely with them, Julius Zollezzi, Gonzales Medina, who put the original panel in—there has been a lot of work and the *Elizabeth C.J.* results were the result of work that was done in 1972, 1973, 1974 and 1975 when a lot of people said that there was no progress being made.

Mr. LEGGETT. All right. Very good.

I think we have asked all of the questions that we want to ask at this point, so thank you very much.

We now have Mr. William Butler, Washington counsel for the Environmental Defense Fund, and Mr. Bud Fensterwald, counsel.

Mr. FENSTERWALD. Mr. Chairman, we represent different clients.

Mr. LEGGETT. Very good, or very bad, I do not know which.

But, so be it.

Who wants to go first?

STATEMENT OF WILLIAM A. BUTLER, WASHINGTON COUNSEL, ENVIRONMENTAL DEFENSE FUND

Mr. BUTLER. Bud has let me lead off. I do want to make a correction in the agenda, however.

Mr. LEGGETT. The agenda will show that the Environmental Defense Fund is represented by Mr. William Butler.

Mr. BUTLER. That is important. The two groups that you see before you have very different positions in both the administrative and the court proceedings. In fact, in the court proceedings the Environmental Defense Fund and the some 15 groups that it represents is basically supporting the position of both the industry and the Government, asking for an interim regime of some take of porpoises during the time required to issue final regulations for 1977.

I might say that in the administrative hearings we suggested that a quota be set for 1977 which was not only above the level initially suggested by the National Marine Fisheries Service, but also above the level put forth by the Marine Mammal Commission. So we have been reasonable in compromising with the interest of the parties on the other side. Mr. Fensterwald may speak speak for his own group. They think we have been eminently unreasonable.

There are very different positions being taken by the environmental coalitions that you see sitting before you. I think it would be a tragic mistake for this committee not to realize that there are differences of opinions among the environmental groups on this question.

Mr. LEGGETT. You will be shown as representing the Environmental Defense Fund, and you speak for that group and your associated constituencies, and Mr. Fensterwald will be shown as speaking for the fund for animals and whatever other groups with which he might identify.

Mr. BUTLER. Even that is wrong.

Mr. LEGGETT. I will withdraw that. Let us not confuse the record.

Mr. BUTLER. Fund for animals is one of those that the environmental defense fund group represents.

Mr. LEGGETT. Who do you represent, Bud?

Mr. FENSTERWALD. Committee for Humane Legislation and Friends of Animals.

Mr. LEGGETT. Do you represent the Committee for Humane Legislation or Friends of Animals?

Mr. BUTLER. Neither one.

Mr. LEGGETT. So we have a mutually exclusive situation here.

Mr. BUTLER. Today my statement is being made only on behalf of EDF, Defendants of Wildlife, Sierra Club and the National Audubon Society. All of them are EOF coalition members before the courts and the administrative agency. But there are many other groups for which I am not speaking today that EOF is representing in both the courts and before the administrative agency. In no case do we represent the two groups that are represented by Mr. Fensterwald.

Mr. LEGGETT. Now, with respect to the groups represented by Colonel Kaufman?

Mr. BUTLER. We represent all of them.

Mr. LEGGETT. You represent all of those?

Mr. BUTLER. Yes.

Mr. LEGGETT. Very good.

Your statement, Mr. Butler, will appear in the record as though fully delivered, and you can extemporize as you wish.

[The statement follows:]

STATEMENT OF WILLIAM A. BUTLER, GENERAL COUNSEL, ENVIRONMENTAL DEFENSE FUND ON BEHALF OF EDF, THE SIERRA CLUB, DEFENDERS OF WILDLIFE AND NATIONAL AUDUBON SOCIETY

The current legal confusion concerning the tuna/porpoise problem is deceptive. It would admittedly appear at first glance that we are no closer to a solution to this vexing problem than we were last year at this time. Litigation is proceeding in two judicial circuits; administratively the National Marine Fisheries Service has not yet issued its final 1977 porpoise regulations, which for procedural reasons will not go into effect in any event until April; and efforts are again being made by the industry to capitalize on the situation by proposing weakening amendments to the Marine Mammal Protection Act.

However, let us look carefully at the facts. In our opinion, the most salient point to be made in considering amendments to the Act is as follows: The Act is working as it is presently constructed. To amend it now would be a mistake. It is being applied successfully in such cases as Alaskan Marine Mammals, Fouke Fur Company, Southern Sea Otters, and now even Tuna/Porpoise. Problems which have arisen with regard to tuna/porpoise are not within the Act, but rather with the original recalcitrance and subsequent leisurely implementation of the Act's administrative requirements by the National Marine Fisheries Service in 1976.

Two examples of immediate importance spring to mind: (1) Last May during U.S. District Court argument before Judge Richey, the government indicated that it would take as long as seven years to determine optimum sustainable population (OSP) levels for the species of porpoise involved in the U.S. yellowfin tuna fishery. Prompted by Judge Richey's decision that such levels must be determined under the Act before a permit can be issued, NMFS somehow managed to condense that seven-year effort into four days in July, providing us in early September with the information needed to begin the regulatory process which will eventually culminate in final regulations for 1977, but; (2) NMFS failed to begin the hearing process until mid-November, thus creating the delay in implementation of final regulations and associated problems which we now face.

The short-range problem now is whether any porpoise can legally be taken before final 1977 regulations take effect in April. A proposal for interim regulations which would permit taking of porpoise, supported by NMFS, the industry, and most environmental groups including those represented by EDF, is currently pending before the U.S. Court of Appeals for the District of Columbia. If equitable relief is granted, the major current cause for industry complaint will evaporate. Should the Court refuse to grant the requested relief, at most the tuna industry faces only another six-to-seven weeks of fishing by other means than "on porpoise." (In this regard it should be remembered that last year's government figures show that for the comparable first four months of the fishing year as a matter of choice the industry fished only 30 percent "on porpoise," and 70 percent by other methods.) The U.S. fleet is out fishing right now, admittedly inconvenienced by not being able to set on porpoise, but not fatally so. It is only after May when the fleet moves far offshore that the ability to set on porpoise becomes critical.

There is thus neither time nor reason to amend the Act in order to provide relief to the industry for this interim period. And the need to amend the law for more permanent "relief" will undoubtedly be obviated by the administrative determination which is expected any day now from the Director of the National Marine Fisheries Service, Mr. Schoning. It is all but certain (based on the recommendation of the Administrative Law Judge) that the 1977 regulations will be acceptable to the industry, and we are hopeful that they will be acceptable to environmentalists as well.

In any event, it is certain that the industry can comply with the Act, and with the regulations written to implement it. It is further evident, especially now that NMFS, under prodding by the Court of Appeals, has expressed its intention to utilize aerial surveillance and a stepped-up observer program, that the government can implement and enforce the Act. Evidence offered at the recent administrative hearings on the proposed 1977 regulations showed clearly that in large part the solution to the tuna/porpoise problem, improved techniques and equipment, is already at hand if it can only be implemented.

It is interesting to note that last year approximately twenty of the boats were so successful in catching tuna without killing porpoise that if their level of expertise had existed throughout the fleet, only perhaps as few as 10,000 or less porpoises would have died. As it was, between 84,000 and 112,000+ porpoises were killed, with only a few boats responsible for a disproportionate amount of the kill. Clearly the answer is to be found in a well-integrated training, gear modification, and incentive program, rather than in special interest legislation to amend the law. Industry self-policing to eliminate incompetent skippers and ill-equipped or unsuitable fishing boats alone will reduce mortality tremendously.

As to the matter of U.S. vessel transfers to foreign flags, it seems most unlikely that this often-repeated threat will ever occur, certainly in the near term. For the most part U.S. boats are owned by U.S. corporations and banks reluctant to see their substantial investments placed under the uncertainties of foreign jurisdiction. Permission to transfer vessels must be obtained from the Maritime Administration, which under law would have to certify transfers would not adversely affect national security, whereas uncontradicted testimony at the recent NMFS administrative hearings was that the U.S. tuna fleet was a national security asset. Further, transfers can and have been made conditional upon the new foreign owners complying with the MMPA.

There are additional factors making large-scale defection of the U.S. tuna fleet to foreign flags unlikely. The official U.S. government position regarding the reach of the MMPA is that it applies to U.S. citizens wherever they may be. Thus both captains and crews who stayed with their vessels after transfer would have to be prepared to give up their U.S. citizenship. And finally, given the MMPA's ban on imports caught by methods proscribed to U.S. fishermen, all these boats and the countries to which they transferred would have to be prepared to give up the U.S. as a market for their tuna. While other markets exist, they are neither so well developed nor profitable currently as is the U.S.

Looking toward the future, all parties of interest recognize that the foreign take problem is a serious one. It is only with regulation of all tuna vessels, both foreign and domestic, that this problem can ultimately be resolved satisfactorily. At this moment, approximately 70–75 percent of all porpoises killed incidental to commercial tuna operations are killed by U.S. flag vessels. However, as vessel technology is transferred and as U.S. regulatory efforts under the MMPA become successful, this ratio is bound to change. Legislation already on the books (both the MMPA and the Pelly Amendment to the Fishermen's Protective Act) provide agencies of this government with the power to require the same standards of foreign boats that we do of our own vessels if they are to maintain the U.S. as a market. This significant incentive, plus promising developments in the IATTC and the possibility for forthright bilateral negotiations, make the prospects of equitable regulation for all commercial tunaboats, as well as the prospects for international porpoise protection, seem at least hopeful. Once we have gotten the problem in hand at home, environmentalists look forward eagerly to helping the government and the industry resolve the problem abroad. It is in this international arena that Congress should now be focusing its attention, with questions on how forcefully the international sections of the MMPA are being implemented by the responsible agencies.

The present spate of litigation concerning the lack of porpoise regulations for the first four months of 1977 is the aftermath of serious errors of judgment made by NMFS during 1976. This situation need never again occur, and in any even cannot be eliminated by legislative amendment. Now that NMFS has shown itself willing to implement the existing Act with some imagination and enthusiasm, it would be tragic to slow momentum again with changes in the rules. The effect of the Act upon the tuna industry has not been severe in the past, is not now, and need not be in the future. Almost all environmental groups concerned with this problem, certainly the ones the Environmental Defense Fund represents, have accommodated their positions in both the recent administrative hearings and court litigation to the interests of the other parties, including the economic interests of the industry. To undermine by weakening amendments progress made to date would have the ironic effect of reducing current incentives to solve this problem just when cooperative solutions appear to be at hand.

Mr. Butler. This late in the day, I do not think anyone has the heart to go through an entire 7-page statement verbatim, so I will try to summarize:

Let me try to be optimistic.

The current legal confusion concerning the tuna/porpoise program is deceptive. It would admittedly appear at first glance that we are no closer to a solution to this vexing problem that we were last year at this time.

Litigation is proceeding in two judicial circuits: administratively the National Marine Fiseries Service has not yet issued its final 1977 porpoise regulations, which, for procedural reasons, will not go into effect in any event until April; and efforts are again being made by the industry to capitalize on the situation by proposing weakening amendments to the Marine Mammal Protection Act.

Mr. Leggett. And, I might add, the inability of the Marine Mammal Commission to come up with more expeditious recommendations and perhaps this committee to be more forthright in seeing that action was taken by these agencies in the 2-year grace period.

Mr. Butler. You said it, Mr. Chairman, not me.

However, it does strike me, in the last year or two this committee has been a strong positive factor in getting the train on the tracks.

Two examples of immediate importance spring to mind.

Then I go on here to suggest that, at most, this is a 6- to 7-week problem for the rest of this year.

There is thus neither time nor reason to amend the act in order to provide relief to the industry for this interim period. And the need to amend the law for more permanent relief will undoubtedly be obviated by the administrative determination which is expected any day now from the Director of the National Marine Fisheries Service, Mr. Schoning. It is all but certain—based on the recommendation of the administrative law judge—that the 1977 regulations will be acceptable to the industry, and we are hopeful that they will be acceptable to environmentalists as well.

I move on now through the statement.

It is interesting to note that last year approximately 20 of the boats were so successful in catching tuna without killing porpoise that if their level of expertise had existed throughout the fleet, only perhaps as few as 10,000 or less porpoises would have died. As it was, between 84,000 and 112,000 porpoises were killed, with only a few boats responsible for a disproportionate amount of the kill.

And here we are already corrected. According to NMFS testimony earlier today, approximately 104,000 porpoises were killed last year by the U.S. fleet in the 10-month season before the quota was met. That is an annual rate of 130,000, incidentally.

Clearly the answer is to be found in a well-integrated training, gear modification, and incentive program, rather than in special interest legislation to amend the law. Industry self-policing to eliminate incompetent skippers and ill-equipped or unsuitable fishing boats alone will reduce mortality tremendously.

Then I have dealt in several paragraphs with why I think, at least in the short run, the question of the transfer of the U.S. fleet to foreign flags is an unrealistic threat. In the long run it may be possible, but in the short run I think it is necessary to read them over to the committee, in light of the chairman's earlier emphatic remarks on the subject.

Looking toward the future, all parties of interest recognize that the foreign take problem is a serious one. It is only with regulation of all tuna vessels, both foreign and domestic, that this problem can ultimately be resolved satisfactorily. At this moment, approximately 70 to 75 percent of all porpoises killed incidental to commercial tuna operations are killed by U.S.-flag vessels.

Those were last year's figures. Obviously it is not true of the U.S. boats at this exact moment, since they are not fishing for porpoise, but it was the 1976 annual figure or the 1975 annual figure.

However, as vessel technology is transferred and as U.S. regulatory efforts under the MMPA become successful, this ratio is bound to change. Legislation already on the books—both the MMPA and the Pelly amendment to the Fishermen's Protective Act—provide agencies of this government with the power to require the same standards of foreign boats that we do of our own vessels if they are to maintain the United States as a market.

I would summarize the rest of this paragraph by saying that this committee heard this morning from Mr. Brewer, the general counsel of NOAA, that the National Marine Fisheries Service is basically not enforcing the import regulations of the act, or is enforcing them on a pro forma basis only.

It is in this international arena that Congress should now be focusing its attention, with questions on how forcefully the international sections of the MMPA are being implemented by the responsible agencies.

The present spate of litigation concerning the lack of porpoise regulations for the first 4 months of 1977 is the aftermath of serious errors of judgment made by NMFS during 1976.

This situation need never again occur, and, in any event, cannot be eliminated by legislative amendment. Now that the NMFS has shown itself willing to implement the existing act with some imagination and enthusiasm, it would be tragic to slow momentum again with changes in the rules.

The effect of the act upon the tuna industry has not been severe in the past, is not now, and need not be in the future.

Almost all environmental groups concerned with this problem, certainly the ones the Environmental Defense Fund represents, have accommodated their positions in both the recent administration hearings and court litigation to the interests of the other parties, including the economic interests of the industry. To undermine by weakening amendments progress made to date would have the ironic effect of reducing current incentives to solve this problem just when cooperative solutions appear to be at hand.

It strikes me that 1977 is a critical year on the basis of the administrative hearings in which we recently participated. It seems to me that gear technology and the fishing techniques are already at hand substantially to reduce the take of porpoise. The real question is: Can this gear be acquired and put on board, and can the techniques be learned by the skippers, and can the industry or the Government remove those few 14-equipped boats and/or relatively incompetent skippers that are ballooning the take?

If these things can be done, it seems to me that there would be a dramatic reduction in taking of porpoise, and it would be clear to everyone that there has been sufficient improvement so that the act need not be amended.

There are just a few items that I have heard through a day of sitting here listening to testimony that I want to address myself to ever so briefly.

First of all, I think it is important that we recognize that while there has been some improvement in the take of porpoise per set, that since 1974 when the act first applied to the tuna industry, we have had annual takes of 99,000 in 1974, 135,000 in 1975, and last year's take for 10 months was 104,000, which is an annual rate of 130,000.

Now, that is a plateau of well over 100,000 a year, and in fact shows no discernible downward trend at all to me.

There is plenty of room for improvement here, and last year those 20 boats I was talking about have shown that it can be done.

I would look for dramatic improvements this year under the present act.

There are some other facts I think that the Chair might have misinterpreted from earlier testimony.

I heard the Chair say, I believe, that something like 50 percent of the domestic consumption of tuna is caught on porpoise. The figures from the administrative hearings in the sworn testimony for 1975, which was last year, for which full figures were available, was that 19 percent of the U.S. domestic consumption was yellowfin taken on porpoise. That was 19 percent, not 50 percent.

Mr. LEGGETT. I do not think—I did not intend to say that.

Mr. BUTLER. Perhaps I——

Mr. LEGGETT. Quoting the figures that were presented, I think I said 140,000 tons of——

Mr. BUTLER. But it is necessary to be careful in quoting the figures of tuna caught by seine boats and tuna caught by seine boat on porpoise. Because there is a distinction.

Mr. LEGGETT. I understand.

Mr. BUTLER. Anyway, I thought I would pick that up. Perhaps I heard it incorrectly.

Mr. LEGGETT. I think that what I concluded was that 30 percent of all of the tuna consumed in the United States, both imported and domestically produced, were probably caught off of porpoise.

Mr. BUTLER. The figures for 1975 in that regard were 19 percent. I cannot swear to the 1976 figures. I have not seen an affidavit on it.

Mr. LEGGETT. I think the 50 percent covers the American-produced tuna, not the foreign.

Mr. BUTLER. It was the total U.S. consumption. These were the Government figures. I can submit the report. But I thought it was necessary to point that out.

Next of all, I think that the impression has been left that for this period of time, from January through March, the U.S. fleet, by and large, has not been taking porpoise, and foreign boats have been, and therefore the total amount of porpoise killed will be greater for this 3-month period than if the U.S. fleet had taken porpoise, since foreign boats kill more porpoise per set than U.S. boats. This is manifestly not true. The foreign fleet is only about a quarter to a third as large as the U.S. fleet, and they were fishing on porpoise last year just as they are fishing on porpoise this year, so that the increased take of porpoise by foreign boats is going to be minimal, and you need only subtract the total amount of porpoise that was taken last year by the U.S. fleet to see porpoise are better off this year.

So the total amount of porpoise that is going to be taken during this 3-month period is going to be significantly less than last year, even if the foreign fleets take more per set than the U.S. fleet. The foreign fleet has not grown that dramatically since last year. So more porpoise will not be killed this year than last. This was a point that I might have misunderstood, but I thought it was a concept that was erroneously left in the Chair's mind.

Mr. LEGGETT. There is only so much tuna, 210,000 is going to be taken out of the CYRA area.

Mr. BUTLER. That is right.

Mr. LEGGETT. And I would imagine that the bulk of that will be taken off of porpoise.

Mr. BUTLER. I think that is not correct. I think the Chair earlier made the statement that most of that CYRA quota will be taken by foreign boats. It will not. It will be taken by U.S. boats. The U.S. fleet is out there. It is significantly larger than the foreign fleet, and even if its U.S. fleet is catching less than last year, still it can fish for skipjack and small yellowfin "on logs", so the total amount taken out of the CYRA is going to be tremendous.

Mr. Leggett. What is your estimate?

Mr. Butler. I cannot estimate the specifics. I do not know the specifics.

But I do know this: that if the foreign fleet is only a quarter to a third of the size of the U.S. fleet, and if the U.S. boats are claiming that thus far their diminished take or the total diminished take has only been something like 2,000 tons this year to date compared with late, and the U.S. diminishment in take this year over last has been only 10,000 tons, that is going to result in the U.S. fleet being way ahead of the foreign fleet in total catch by the time the quota is not.

The next point that I wanted to raise is that there was some testimony that new fishing areas cannot be developed under the Richey interpretation of the law. That is wrong. If new areas are to be developed for fishing on porpoise, a permit will be required, but that can be done.

If porpoise fishing is not to take place, any experimentation that is necessary can take place right now, without a permit.

For example, the administrative hearings heard that a number of U.S. boats fished last year and will fish again this year off the coast of New Zealand, and that is experimental fishing, and fishing which is in no way affected by the Richey order, permits or otherwise.

So with these very minor, I think, housekeeping details, I just do want to stress to the Chair that it is our impression from the result of these NMFS hearings that, if the administrative decision by the National Marine Fisheries Service is such that it keeps the pressure on the industry to implement the improvements which we already know can be made, finally, 5 years after the passage of this act, 1977 will be the first year in which it truly works. Next year at this time there will be no excuse for the confusion we currently find about whether there can be any taking during the period before good regulations are unusual, because any hearings which need to take place for the 1978 permits can be done well in advance of the time when it is necessary to make this decision, and the fishing can commence under those rules beginning next January 1.

It is too bad that it has taken us 5 years, and it is too bad from our point of view that we have this 3-month period in which there is a frantic battle going back and forth in the courts, which is, at the very least, embarrassing to all concerned, and terribly consuming of time, money, and energy.

But there is nothing that legislation can do to remedy that which were basically errors in judgment made last year. We look forward in 1977 to a far improved performance by the fleet, and one which will in fact meet most of the standards which have been set forward by the act.

That may be unreasonably optimistic, but in this date in February, on a gloomy afternoon, having listened to a day's recitation of problems in implementing the act, it seems to me that someone needs to say something about how this body in passing the NMPA 5 years ago, might have had some sense, too.

Mr. LEGGETT. Very good. Your statement is brief and very helpful.

Let me state this. You indicate that a proposal for interim regulations which would permit taking of porpoise, supported by the NMFS, the industry, and most environmental groups, presumptively, not Mr. Fensterwald, but including those represented by EDF, is currently pending before the U.S. Court of Appeals for the District of Columbia.

What kind of quick fix are you proposing there?

Mr. BUTLER. It has been pending since last December. It is proposed that the draft regulations proposed last October go into effect during this interval prior to issuance of the final 1977 regulations. This would permit a take of 10,000 porpoise. It would require 25 percent observers.

It would prescribe taking of mixed schools or indeed any schools which involved spinner porpoise at all, but, nonetheless, it would permit taking of other species of porpoise.

This has been pending on the merits before the U.S. court of appeals since the last week in December, and indeed the final briefs have long since been submitted, and a decision is expected at any time from the U.S. court of appeals.

If this decision were favorable, it would solve the problem almost overnight. I have no idea as to whether the U.S. court of appeals is going to act favorably or when they are going to act, but I do know they have not yet acted on the substance of the question which is before them, and therefore there is still room for some hope that the problems of this interim period will be remedied by the U.S. court of appeals here.

It was widely thought by, I think, those who did not follow the litigation closely, that when the court of appeals here issued its most recent order, in effect asking Judge Enright in San Diego to stay his decision which would have permitted the taking of porpoise, that the Court of Appeals was saying that there could not be any taking of porpoise, period, until issuance of final regulations, thereby answering the substantive question which is before them.

I think that is a wrong interpretation. I think it was a reassertion of what they felt to be their prior jurisdiction to answer the question, but the question is still before them to be answered.

Mr. LEGGETT. Has anybody asked the court what they mean?

Mr. BUTLER. Excuse me?

Mr. LEGGETT. Has anybody sought to ask the court what they mean?

Mr. BUTLER. It is clear to the litigants that pending before the court of appeals is the substance of the request by the industry and the Government, supported by EDF, that this interim regulation permitting the taking of porpoise go into effect. It may well be that the court of appeals in its present stance will simply delay deciding that question until after it becomes moot. I do not know, but it is equally possible that a decision could be forthcoming by this afternoon.

Mr. LEGGETT. And you indicate that most of the environmentalists, and the industry and the Government, support that temporary solution?

Mr. Butler. That is right.

Having said that, obviously the industry wants more than that.

The environmentalists that we represent are queasy about our position but nevertheless there is an uneasy coalition at this moment among the three groups that at least some interim take of porpoise would be better than the present situation.

That is not true for Mr. Fensterwald's clients, for whom he can speak. It is true that the industry is asking for more, but at the very least the common ground is for what the Government has requested, which is to say that the interim preliminary regulations with a quota of 10,000 go into effect for this period of time before the 1977 regulations are final.

Mr. Leggett. Well, we will get a determination from the court when it is prepared to act.

Mr. Butler. That is right.

Mr. Leggett. What would be wrong with a separate act of Congress that does not amend the Marine Mammal Act, but just purports to affect that quick fix which would then evaporate when the final regulations are adopted.

Mr. Butler. I suppose your judgment is as good as mine on that.

My feeling would be that it is a mistake to have quick fixes, specifically statutory amendments of regulations for a period of 5 to 6 weeks: (a) practically it is difficult to do; (b) it sets a precedent and encourages people to come in and ask for it again; (c) I am not absolutely confident that it is necessary, and (d) at least until the National Marine Fisheries Service makes its final determination, Congress could be accused of unduly influencing, I suppose, a decision of an administrative agency on such questions as taking of spinner porpoise, and whether or not white-bellied and/or eastern spinner are depleted.

Questions of this nature are delicate and scientific. You heard the Government today was unwilling to discuss the matter until the regulations are final.

Mr. Leggett. I do not intend that we would act prior to the implementation of the regulations.

But assuming that they did implement the final regulations within a reasonable period of time——

Mr. Butler. As I understand it, after an administrative decision during the comment period and/or after an unfavorable decision by the court of appeals, special legislation to cover only the period of maybe 4 to 5 weeks would be involved. There is no question in my mind that the final decision of the Director for the National Marine Fisheries Service will permit the taking of some porpoise. It may make the industry unhappy, and it may make us unhappy as to where he is going to come out, but there is going to be some taking of porpoise.

Again, I would only say from my own perspective that I think that special-interest legislation covering a period of 4 weeks is, generally speaking, not a very good precedent for Congress, and in this type of a situation I would prefer to see 4 weeks of continued school fishing or skipjack fishing rather than set the precedent that special interest groups, whoever they may be, can come in and get quick fix legislation to authorize a few weeks of changed procedures.

I think this is an undignified as well as perhaps an unwise way for Congress to proceed on very difficult and complicated legislation.

Mr. LEGGETT. We did that last week in order to allow the 200-mile limit law to be effective by March 1.

Mr. BUTLER. I know you did that.

Mr. LEGGETT. There is a policy in that, and we acted in 3 days.

Mr. BUTLER. I remember the blackbird incident of last year, which I would use as a counter example, where it seems to me, in retrospect, perhaps a little greater time might have resulted in somewhat more discrete action, and perhaps even no action.

Mr. LEGGETT. Your views are appreciated.

Mr. Anderson, do you want to examine?

Mr. ANDERSON. No questions.

Mr. LEGGETT. Counsel?

Mr. MANNINA. No.

Mr. SPENSLEY. No questions.

Mr. LEGGETT. OK, Mr. Eisenbud.

Mr. EISENBUD. I wonder if you would indulge me, and allow me to offer a clarification of one point, Mr. Chairman.

You made mention of the Commission's role in the period between 1972 and 1974. I would just like to note that the Commission was not funded as operational during most of that period. The Commission was not able to establish offices until February of 1974, toward the conclusion of the interim period. As you know, we participated in the first hearing in May 1974 and we offered detailed recommendations in July of 1974. I respectfully submit that if those were adopted they would have proven formidable and helpful to effort to solve the problem.

If you would like, I can submit those for the record.

Mr. LEGGETT. Good. You can submit those for the record, and your explanation will be used in mitigation——

[The following was received for the record.]

MARINE MAMMAL COMMISSION,
Washington, D.C., July 30, 1974.

ROBERT W. SCHONING,
Director, National Marine Fisheries Service, NOAA, Department of Commerce, Washington, D.C.

DEAR MR. SCHONING: The Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals have been pleased to cooperate with you and members of your staff in developing regulations and information relating to the incidental taking of marine mammals in the course of commercial fishing operations, pursuant to Sections 101(a)2, 103, 104, 111 and 202 of the Marine Mammal Protection Act. As you know, these cooperative efforts have included consultation concerning the proposed rules governing the incidental taking of marine mammals in the course of commercial fishing operations prior to their publication in the Federal Register on April 30, 1974 (39 F.R. 15042), participation by counsel at the public hearing on those regulations in Seattle, Washington on May 15 and 16, 1974, and submission of a brief to the Administrative Law Judge containing recommended changes, as well as meetings in San Diego and at the Southwest Fisheries Center, La Jolla, and correspondence and conversations relating to porpoise population and estimated kill data.

In further consultation and pursuant to the Act, I am pleased to transmit, on behalf of Dr. Victor B. Scheffer, Chairman of the Commission, the following additional comments and recommendations relating to the incidental taking of marine mammals in the course of commercial fishing operations:

I. RESEARCH

The immediate focus of research efforts relating to the incidental taking of marine mammals in the course of commercial fishing operations should be the development of gear and techniques which will result in the reduction of incidental mortality and serious injury rate to an insignificant level approaching zero. Additional efforts should be devoted to gaining an understanding of such aspects of the subject as the bond between yellowfin tuna and porpoise to facilitate the development of effective gear and techniques. Estimate of mortality and serious injury and the population levels of marine mammals subject to incidental taking are also needed to permit an assessment of the significance of the impact of such taking on those populations.

Although progress has been made toward reducing porpoise mortality and serious injury incidental to commercial tuna fishing, the total kill and serious injury levels remain unacceptably high. Gear and techniques such as the Medina panel, the current indicator, the antitorque cable, the backdown procedures, and the training of skippers appear to contribute to some reduction in the rate of incidental mortality and serious injury. However, indications are that no matter how widely these new devices and techniques are utilized by the industry in the course of commercial tuna fishing operations, they will probably not, in themselves, produce an acceptably low rate of incidental kill and injury. The Commission is convinced by a review of current research efforts that more and substantially different research is urgently needed and should be instituted as soon as possible.

Mortality and serious injury statistics seem to be increasingly available, at least with respect to commercial yellowfin tuna fishing operations within the IATTC permit zone (CYRA), and some data are becoming available with respect to operations conducted outside the permit zone. Extrapolations from these data are being reduced to provide a limited idea of the impact of incidental taking upon the porpoise populations as a whole. The Committee of Scientific Advisors is proceeding with its efforts to provide you with estimates of the incidental taking in response to your request but progress has been delayed by the unavailability of some data. The Southwest Fisheries Center has recently made the necessary data available to permit the Committee to estimate incidental take figures for the 1971-73 seasons which should be transmitted in the near future. Data relating to the 1974 season have not yet been received from the Center. An estimate by the Committee of the incidental take resulting from regulations which apply to commercial fishing operations after October 1974 will, of course, not be available until those regulations are finally prescribed and data derived from fishing under those regulations are available.

A NMFS aerial reconnaissance program to determine porpoise population levels has been reviewed by the Commission and Committee. This program is limited in scope, by aircraft range, to approximately 500 miles offshore and the results of the program are very difficult to interpret because of weather, sea state problems, inadequate ground truth data, observer variations and fatigue, and other factors which were discussed at a meeting in La Jolla. Neither the kill statistics program nor the aerial reconnaissance program provides reliable direct data on the frequency of capture of individual animals, population sizes, population movements, or age related mortality. It is our opinion that at the conclusion of the present work on this subject, the very important datum of total population size for the porpoise populations impacted by commercial tuna fishing operations will be, at best, crudely and inadequately known.

Although NMFS work on the life histories of the affected porpoise species seems to be proceeding well, data on the nature of the tuna-porpoise bond, the behavior of porpoises inside and outside the net with relation to each other, differential behavior that might allow separation of fish and porpoise, and the exact nature and timing of mortality in the net, are essentially nonexistent and we are aware of no program, presently contemplated by NMFS, to gather such data.

Research on gear modification and development has thus far resulted in some reduction in kill and serious injury but future research and development plans seem, in our opinion, to be far too restricted to substantially contribute to a solution to this problem. Further testing of new gear and techniques as well as modifications of those presently utilized should be undertaken. Much of this testing must be carried out at sea and under actual fishing conditions. One of the most serious deficiencies of the present program is the inadequacy of available ship time for such research and development efforts. In addition, the Commission is concerned that certain innovative gear developments and techniques may not be receiving adequate consideration because of an unduly restrictive view of the options which are available under the tests of practicability or feasibility of Sections III(b) and (c) of the Act.

Finally, the Commission is concerned that funds now allocated to work on this subject are inadequate.

These observations and concerns lead the Commission to recommend that:

(1) Research on techniques and gear design and modification be accelerated and broadened rather than restricted, as now appears to be the trend. Smaller mesh sizes, the tapered net, the double backdown, use of ponga boats as tow vessels, the hukilau, and various other gates and devices to facilitate porpoise release and prevent entanglement should be thoroughly explored and tested at sea during numerous experimental cruises;

(2) Short-term efforts to achieve immediate reduction of incidental kill be continued and expanded but, since such efforts are unlikely to yield a total solution to this problem, more emphasis must be placed upon simultaneously gaining a basic understanding of the problem;

(3) Research efforts be directed toward understanding the tuna-porpoise bond, and a detailed behavioral analysis of both fish and porpoise during pursuit and capture be made, utilizing such means as underwater films of the entire process and the placement of behavioral scientists as observers on experimental and regular fishing cruises:

(4) The National Marine Fisheries Service continue their population dynamics program, and, for each affected species, develop population models which include growth curves, recruitment rates, age at sexual maturity, and other relevant factors;

(5) An intensive program of tagging, release, and recapture of porpoise caught in nets be initiated. The tagging methods of choice appears, at this time, to be cryobranding the dorsal fin and perhaps fin notching. Validation work on these techniques should be carried out on captive animals prior to any major use at sea;

(6) The National Marine Fisheries Service aerial reconnaissance program be refined to resolve certain problems noted and especially to develop ground truth data and to estimate errors from other sources. Other innovative aerial census methods, such as infrared sensing of porpoise respirations, may be feasible and should be examined;

(7) Much more reliable estimates of both population sizes and population trends be developed by the efforts suggested above and other means;

(8) Definitive information on the extent of porpoise mortality and serious injury incidental to tuna fishing operations in areas of the world other than the CYRA be gathered;

(9) Intensive efforts be undertaken to stop unpermitted out-of-season fishing in the CYRA;

(10) Efforts be undertaken to secure more frequent permitted out-of-season access to the CYRA by experimental craft; and

(11) Efforts be undertaken to discuss and seek agreement with other fishing nations that vessels engaged in commercial fishing operations be required to use such modifications of gear and technique as have proven effective in reducing incidental mortality and serious injury.

The Commission estimates that at least $1,000,000 per annum will be needed to carry out a reasonable National Marine Fisheries Service research program.

The Commission welcomes the U.S. tuna fleet's recently manifested recognition of the severity of this problem and their willingness to contribute their expertise and efforts to its solution. Consistent with this constructive and cooperative approach, the Commission invites NMFS to promptly join with it in exploring with the fleet the feasibility of industry dedication of a tuna purse seiner and crew to conduct relevant research and testing at sea under operating conditions in efforts to develop the most mutually desirable, immediate and effective resolution of the problem.

The Commission and the Committee look forward to cooperative efforts with NMFS and the tuna industry in the development and implementation of the research and development program outlined above.

II. PROPOSED REGULATIONS TO GOVERN THE INCIDENTAL TAKE OF MARINE MAMMALS IN THE COURSE OF COMMERCIAL FISHING OPERATIONS

The following comments and recommendations for modification of the proposed regulations as published in the Federal Register on April 30, 1974 (39 F.R. 15042) are consistent with the proposed modifications contained in the Commission's brief filed with Chief Judge Harry S. McAlpin on June 10, 1974, and have been formulated with the benefit of the views expressed in the National Marine Fisheries Service's brief and the Recommended Decision of Judge McAlpin, dated July 15, 1974, which were not then available. The recommendations are, in all cases, based upon the record of the hearing in Seattle, Washington on May 15 and 16, 1974, consisting of testimony contained in the transcript, exhibits received in evidence, and documents of which official notice was taken.[1] In consideration of these materials and pursuant to Sections 111(b), 103, and 202, I am pleased to transmit the following recommendations of the Commission relating to the proposed regulations:

1. Section 216.24(b)(1)(ii) should be modified to read:

(ii) Encircling Gear; Tuna Purse Seining. *Purse Seines Set on Porpoise to Catch Yellowfin Tuna.* Shall include those commercial fishing operations utilizing purse seines solely for tuna.

"Porpoise fishing" in the yellowfin tuna fishery in which purse seines are intentionally set on porpoise in the course of enclosing and capturing yellowfin tuna.

The conduct of commercial fishing operations known as "porpoise fishing" for yellowfin tuna is the source of most involvement of marine mammals in commercial fishing operations and results in the greatest number of incidental deaths and injuries (Statement of Mr. Jensen, TR 66-69).

Section 216.24(b)(1) was designed to address the incidental take of marine mammals resulting from "porpoise fishing" (Statement of Mr. Jensen, TR 68, 69; Statement of Mr. Blum, TR 218).

The proposed modifications make it clear that this section applies to "porpoise fishing," and deletes ambiguous or ambivalent language which may have caused confusion and uncertainty as to the application of the section to commercial fishing operations (Statement of Mr. Blum, TR 218).

The language recommended by NMFS and the Judge fails to identify "porpoise fishing" as the cause of the major problem and the type of fishing to which this section is addressed. Their language would include "school fishing" and "object fishing" for yellowfin tuna under this category and unjustifiably and inappropriately impose unwarranted requirements relating to gear and techniques upon these forms of fishing.

2. Section 216.24(b)(1)(iii) should be modified to read:

(iii) Encircling Gear; ~~Seining Other Than Tuna.~~ *Seining Other Than Purse Seines Set on Porpoise to Catch Yellowfin Tuna.*

Shall include those commercial fishing operations utilizing seines ~~for species of fish other than tuna.~~ *to enclose and capture fish but which do not utilize seines to intentionally enclose and capture porpoise to catch yellowfin tuna. "School fishing" as distinguished from "porpoise fishing" in the yellowfin tuna fishery is an example of this category.*

The proposed modification clarifies and implements the apparent intent of this section to apply to all seining operations resulting in incidental take of marine mammals other than those which are covered by Section 216.24(b)(1)(ii).

3. Section 216.24(b)(3) should be modified in accordance with the recommendation of Judge McAlpin, which is consistent with the proposed modification suggested in the Commission's brief.

---

[1] TR denotes Transcript of the hearing.
Lined type denotes recommended deletions.
Italics denotes recommended additions.

In addition, the following language should be added to the end of this Section:

The Director shall conduct a public hearing within three months prior to or subsequent to the expiration of such initial general permits at which he shall present information described in Section 103(d)(1)–(4) of the Act with reference to the regulations and permits in effect and the research and development program.

General permits would be valid for approximately two years after issuance under the proposed modification. Two seasons of commercial fishing operations could be reviewed and appropriate modifications made at the end of this period. Imposition of a limitation upon initial validity of general permits serves to focus and coordinate review and appropriate modifications to which the agency is committed (Statements of Mr. Blum, TR 33, 34, 37) and avoids unstructured and awkward proceedings and disputes. General permits would be valid for one year after the initial period of two years. A public hearing at the expiration of initial general permits would afford the agencies, permit and certificate holders, prospective applicants and the interested public, the opportunity to review the status of the program to reduce incidental taking with reference to the considerations expressed in Section 103(d) and the goals of the Act.

4. Section 216.24(b)(4) should be modified to read:

(4) Upon proper application for inclusion under the general permit, certificates of inclusion shall be issued to masters or other persons in charge of vessels engaged in commercial fisheries, or if no vessels are involved, to those ~~who participate in~~ *who are in charge of the conduct of* commercial fishing operations. Such certificates are not subject to public hearings prior to issuance. Such certificates shall not be transferable but will be valid on any vessel or boat, *or in the course of any commercial fishing operation* for which the individual named in the ~~permit~~ *certificate* is the master or person in charge.

The recommended modification makes this section consistent with other sections which make it clear that only persons in charge of fishing operations need obtain certificates and that crew members and others who merely participate in fishing operations under the control of another person need not obtain certificates. Additional language is proposed so that the section is consistent throughout in its application to fishing operations with and without vessels. Since only one "permit" is issued, substitution of the word "certificate" appears to be appropriate to accomplish general applicability.

5. Section 216.24(b)(6) should be modified to read:

(6) Crew members, *as distinguished from masters or persons in charge,* ~~of vessels~~ are not required to possess permits *or certificates.*

The recommended modification simply clarifies the meaning of the section.

6. Section 216.24(c)(1) should be modified to read:

(1) Applications for a general permit will be accepted on the effective date of these regulations. After issuance of a general permit, applications for inclusion under such general permit will be accepted at any time. All persons included under a general permit will receive a certificate evidencing such inclusion and setting forth the period of time during which they may conduct fishing operations under the general permit. ~~Initial certificates shall be valid through December 31, 1975. Thereafter, certificates will expire on December 31 of the year issued.~~ *Certificates of inclusion shall be valid during the period for which the general permit, under which they are included, is valid. Certificates are subject to review, modifications, suspension or revocation so as to conform with the terms and conditions of such general permits and these regulations.*

The recommended modification causes certificates of inclusion to be dependent for their duration, validity, and terms, upon thee duration, validity, and terms of the general permit in which they are included, and subjects them to the regulations.

7. Section 216.24(c)(4) should be modified to read:

(4) ~~Applications should contain a payment of $5.00 for each person named in paragraph (e)(3)(i) of this section.~~ *A fee shall be assessed, prior to granting any application for a general permit or certificate of inclusion, in such reasonable amount as the Director may determine to be necessary and apporpriate to cover the costs to the National Marine Fisheries Service of considering, issuing, and maintaining applications, permits, and certificates.*

The statements of Mr. Jensen (TR 100, 101) indicate that there is no rational basis for the determination that certificates of inclusion or general permits shall cost $5.00. The recommended modification allows such a fee to be computed on a rational basis, consistent with the requirements of Section 104(g) of the Marine Mammal Protection Act and the Independent Offices Appropriations Act of 1952 (31 USC 483(a) (1970)).

Although the Commission does not presume to know or advise NMFS about the actual cost of administering the permit program, we suggest that the costs of hearings, regulations, and administrative paper work necessited by applications for permits are fairly attributed to the cost of administering such a program and exceed $5.00. (The American Tunaboat Association and Tuna Research Foundation both admit, on page 50 of their brief, that hearings are a legitimate cost of the program.)

We suggest that, contrary to the argument in NMFS brief (p. 25-27), there is no record evidence to indicate that the $5.00 figure is in any way related to the costs of administering the program.

Section 104(g) of the Act and a careful reading of both *National Cable Television Assoc., Inc.* v. *U.S.*, 42 U.S.L.W. 4306 (US Mar. 4, 1974) and *Federal Power Commission* v. *New England Power Co.*, 42 U.S.L.W. 4308 (US Mar. 4, 1974) support the view that such fees should cover the costs of the program necessitated by applications for permits and certificates. We suggest that the present fees charged for scientific research and public display permits ($50 and $200 respectively) serve to indicates that either the $5.00 fee is grossly inadequate or the $50 and $200 fees are grossly inflated and that a fee by category, based upon the actual cost of administering the program with respect to clases or permittees, might be more appropriate and effective.

8. Section 216.24(c)(6) should be modified to read as proposed by NMFS (NMFS brief, p. 10).

9. Section 216.24(d) should be modified to read:

(d) Terms and Conditions of Fishing Operating Under General Permits: *Commercial fishing operations conducted under general permits and certificates of inclusion shall be conducted in accordance with the terms and conditions set forth in this section. Permit and certificate holders are deemed, by their appliiations, to consent and agree to comply with such additional reasonable terms and conditions as the Director may require, including but not limited to, requirements relating to: the collection of marine mammals or parts thereof taken incidental to such fishing operations; provisions for authorized personnel aboard their vessels to observe and conduct research related to such fishing operations; and tests of gear and practices designed to further reduce incidental mortality and serious injury of marine mammals.*

The recommended modification adds language which articulates the nature of requirements under general permits and thereby serves to inform the prospective applicant and interested public of the intent of the agency (Statement of Mr. Blum, TR 37, 40, 178; Statement of Mr. Jensen, TR 110), which is otherwise inadequately articulated.

10. Section 216.24(d)(1)(i) should be modified to read:

(i) A certificate holder may take marine mammals so long as such taking is an incidental occurrence in the course of normal commercial fishing operations *conducted pursuant to these regulations*. Marine mammals taken incidental to commercial fishing operations shall be immediately returned to the environment where captured without further injury *unless other action is specified and directed by authorized NMFS personnel.*

The recommended modification clarified that "normal" commercial fishing operations are those conducted pursuant to these regulations. In addition, it articulates the authority of agency personnel to conduct or direct research or other activities with marine mammals taken incidentally to commercial fishing operations conducted pursuant to these regulations.

11. Section 216.24(d)(1)(ii) should be modified in accordance with the recommendation of Judge McAlpin, which is consistent with the proposed modification suggested in the Commission's brief.

The "threat of" personal injury does not admit of rational determination or definition and renders the section unenforceable. The proposed modification deletes the language and serves to allow a person to take steps to protect himself from personal injury rather than from the "threat of" personal injury. The modification seems especially warranted in light of the total lack of evidence in the record of personal injury resulting from marine mammals (Statement of Mr. Blum, TR 219, 220; Statement of Mr. Pisano, TR 302, 303).

12. Section 216.24(d)(1)(iii) should be modified in accordance with the recommendation of Judge McAlpin which is consistent with the proposed modification suggested in the Commission's brief.

The modification adds language to accomplish the intent of the agency that the killing or injury of a marine mammal be permitted only when it is "actually interfering" with commercial fishing (Statement of Mr. Jensen, TR 72) and *only after* all other steps to deter the animal have been exhausted (Statement of Mr. Blum, TR 196).

13. Section 216.24(d)(1)(iv) should be modified to read:

(iv) Marine mammals taken in the course of commercial fishing operations shall be subject to the provisions of Section 216.3 of these regulations with respect to "Incidental catch," and may not be retained except where a specific permit has been obtained authorizing the retention *unless otherwise specified and directed by authorized NMFS personnel.*

The proposed modification is suggested for reasons set forth under 10 above.

14. Section 216.24(d)(1)(iv) should be modified to read as recommended by Judge McAlpin, whose recommendation is consistent with the proposed modification contained in the Commission's brief.

The recommended modification is designed to facilitate the acquisition of information is an complete and useful a form as possible. The record is replete with statements to the effect that much more information is needed, that reporting is an essential and integral part of the permit sysem, and that a standard form for such reports is of great value in securing such information (TR 34, 35, 37, 135, 190, 191, NMFS Exh. 4d, p. 8).

15. Section 216.24(d)(2) should be modified to read:

(2) Encircling Gear; Tuna Purse Seining. *Purse Seines Set on Porpoise to Catch Yellowfin Tuna.*

(i) A certificate holder may take marine mammals, so long as such taking is an incidental occurrence in the course of normal commercial fishing operations *conducted pursuant to these regulations.* Marine mammals taken incidental to commercial fishing operations shall be immediately returned to the environment where captured without further injury *unless other action is specified and directed by authorized NMFS personnel.*

(ii) A certificate holder may take such steps as are necessary to protect his catch, gear, or person from depredation, damage, or threat of personal injury without inflicting death or injury to any marine mammal.

(iii) All certificate holders shall maintain daily logs, *in such form as the Director may prescribe,* of all sets in which marine mammals are taken. Such logs must include the location, time, and date of set, weather, *visibility,* ~~and water conditions,~~ *sea state, estimated number and species of marine mammals upon which set was made, estimated number (tons) of yellowfin tuna enclosed in net,* estimated number and species of marine mammals caught, method used to remove marine mammals from net, amount and kind of tuna caught, and an actual count of marine mammals killed *and seriously injured,* if any, on each set. Such logs shall be subject to inspection at the discretion of the Regional Director, National Marine Fisheries Service, ~~Terminal Island, California, or the Director, NMFS, Washington. D.C., or their designated agents.~~ *where a certificate application was made or at the discretion of his designated agents.*

In addition, copies of all such logs shall be mailed or delivered to the Regional Director, NMFS, where a certificate application was made, at the earliest possible opportunity, but not later than five days after the most recent recording in the log, except that if a vessel at sea returns to port later than five days after such occurrence, then it shall be reported within forty-eight hours after arrival in port.

The recommended modification is suggested for reasons set forth under the preceding sections. Additional language at the end of this section is suggested so as to make the reporting mechanism under these regulations consistent and universally applicable. The record reveals no persuasive rationale for exempting category (b)(1)(ii) certificate holders from the requirements imposed on other commercial fishermen holding certificates under these regulations (TR 103, 104). The recommendations of Judge McAlpin with respect to (ii) and (iii) are essentially consistent with the present recommendations respecting those sections and with the proposed modifications contained in the Commission's brief.

16. Section 216.24(d)(2)(iv)(e)(3) should be modified in with the recommendation of Judge McAlpin which is consistent with the proposed modification suggested in the Commission's brief.

Net collapse is a major cause of porpoise mortality (DEIS 46; Statement of Mr. Zolezzi, TR 412; Statement of Mr. Pisano, TR 320). Although an experienced captain can often foresee a net collapse in advance and there are instances when backdown procedures are effective in facilitating the release of most or all porpoises from the net (TR 130, 133), the fact is that all skippers are not able to foresee and prevent net collapse and that backdown procedures do not always work to release all porpoises. The use of auxiliary boats, as suggested in the proposed modification, would make the protection against net collapse which is afforded by the use of auxiliary boats available and functional on every set. The feasibility and desirability of this modification is suggested by the statements of experienced commercial fishermen who indicated that such boats are normally utilized around the net anyway (Statement of Mr. Pisano, TR 299, 300) and that the boats are available, effective, and have been utilized by the industry (Statement of Mr. Hodgkins, TR 359, 372).

17. Section 216.24(d)(2)(v) should be modified to read:

"(v) All tuna purse seine vessels operated by a certificate holder and engaged in commercial fishing operations under this section shall be required to carry". * * *

The recommended modification clarifies the application of this section.

18. Section 216.24(d)(2)(vii) should be modified in accordance with the recommendation of Judge McAlpin which is consistent with the proposed modification suggested in the Commission's brief.

The recommended modification provides an effective mechanism for inspecting equipment and ensuring competency of certificate holders in the use of required procedures. It thereby implements Section 101(a)(2) of the Marine Mammal Protection Act, which requires that these regulations "insure that those techniques and equipment are used which will produce the least practicable hazard to marine mammals * * *" Both skill and functional equipment were recognized to be essential to successful efforts to reduce incidental mortality and injury (Statement of Mr. Jensen, TR 106).

19. Section 216.24(d)(2)(viii) should be modified in accordance with the recommendation of Judge McAlpin which is consistent with the proposed modification suggested in the Commission's brief.

The recommended modification is suggested for reasons set forth in preceding sections.

20. New Section 216.24(d)(2)(viii) should be inserted in accordance with the recommendation of Judge McAlpin which is consistent with the proposed modification suggested in the Commission's brief.

The recommended modification is designed to provide guidelines and encouragement to certificate holders to take any of several steps which may be available to reduce incidental mortality and injury while, at the same time, recognizing that such decisions are those of the certificate holder alone.

The recommended modification also gives permit and certificate holders, prospective applicants, and the interested public notice rating to publication of standards relating to certain critical aspects of "porpoise fishing" and supplementing the regulations.

21. New Section 216.24(d)(2)(ix) should be inserted in accordance with the recommendation of Judge McAlpin which is consistent with the proposed modification suggested in the Commission's brief

The recommended modification give certificate holders, prospective applicants, and the interested public notice of the fact that a finding relating to the rate of incidental mortality and serious injury may be published.

22. Section 216.24(d)(3) should be modified to read:

(3) Encircling Gear; ~~Seining Other Than Tuna.~~ *Seining Other Than Purse Seines Set on Porpoise to Catch Tuna.*

The recommended modification is suggested for reasons set forth in preceding sections.

23. Section 216.24(d)(3)(i), (d)(4)(i), and (d)(5)(i) should be modified to read the same, respectively, and for the same reasons as the recommended modification of Section 216.24(d)(1)(i) set forth in recommendation 10 above.

24. Section 216.24(d)(3)(ii), (d)(4)(ii), and (d)(5)(ii) should be modified to read the same, respectively, and for the same reasons as the recommended modification of Section 216.24(d)(1)(ii) set forth in recommendation 11 above.

25. Sections 216.24(d)(3)(iii), (d)(4)(iii), and (d)(5)(iii) should be modified to read the same, respectively, and for the same reasons as the recommended modification of Section 216.24(d)(1)(iii) set forth in recommendation 12 above.

26. Section 216.24(d)(3)(iv), (d)(4)(iv), and (d)(5)(iv) should be modified to read the same, respectively, and for the same reasons as the recommended modification of Section 216.24(d)(1)(iv) set forth in recommendation 13 above.

27. Section 216.24(d)(3)(v), (d)(4)(v), and (d)(5)(v) should be modified to read the same, respectively, and for the same reasons as the recommended modification of Section 216.24(d)(1)(v) set forth in recommendation 14 above.

28. Section 216.24(e)(i) should be modified in accordance with the recommendation of Judge McAlpin which is consistent with the proposed modification suggested in the Commission's brief.

The recommended modification clarifies the section so as to make it consistent with the intent of the agency (Statement of Mr. Jensen, TR 70, 71) and with Section 101(a)(2) of the Marine Mammal Protection Act, which clearly suggests that the "standards" to which foreign fishing operations are to be compared are the rates of incidental mortality and injury and not the specific provisions of the regulations. Such an interpretation affords other nations the opportunity to develop alternative fishing techniques which may result in an incidental mortality and injury rate below that of the U.S.

29. Section 216.24(e)(2)(iii) should be modified in accordance with the recommendation of Judge McAlpin which is consistent with the proposed modification suggested in the Commission's brief.

The recommended modification clarifies the section so as to make it comply with Section 101(a)(2) of the Act.

30. New Section 216.24(g) should be inserted in accordance with the recommendation of Judge McAlpin which is consistent with the proposed modification suggested in the Commission's brief.

The recommended modification implements Section 106(c) of the Act and is designed to aid in enforcement of the regulations (Statement of Mr. Woldstadt, TR 342).

The Commission recommends adoption, as final regulations, of the proposed regulations as modified in accordance with the recommendations set forth above and those of Judge McAlpin which are not inconsistent with such recommendations set forth above and those of Judge McAlpin which are not inconsistent with such recommendations and to which we have not addressed our comments.

We would be pleased to discuss these comments and recommendations with you at your convenience and hope they have been of some assistance to you.

Sincerely,

JOHN R. TWISS, Jr.,
Executive Director.

Mr. BUTLER. Let the record show that it was the Chairman's assessment rather than the witness's assessment.

Mr. LEGGETT. That is true.

Now, we are down to Mr. Fensterwald.

STATEMENT OF BUD FENSTERWALD, COUNSEL, COMMITTEE FOR HUMANE LEGISLATION AND FRIENDS OF ANIMALS

Mr. FENSTERWALD. Thank you, Mr. Chairman.

Mr. LEGGETT. Very nice to have you before our committee.

Mr. FENSTERWALD. Thank you.

I do not have a prepared statement. I did not know of the hearing until fairly late in the game.

I wonder if it would be possible to submit a brief statement for the record that I gave to the administrative law judge a month or two ago, which does summarize my position pretty well?

Mr. LEGGETT. That will be incorporated.

[The following was received for the record:]

CONCLUDING BRIEF OF FRIENDS OF ANIMALS, INC., AND THE COMMITTEE FOR HUMANE LEGISLATION, INC.

INTRODUCTION

Because of the mind-boggling size of the record in this case, Friends of Animals, Inc. (FOA) and the Committee for Humane Legislation, Inc. (CHL) believe that they can assist the Administrative Law Judge best, not by one more reanalysis of a mass of basically irrelevant statistics, but by a brief and simple attempt to put the question of the proposed 1977 "incidenta take" back into some recognizable context. In our view, somewhere in the mammoth (and almost endless) hearings in November and December, the forest was lost.

Although the Court was deluged with statistics, counter-statistics, arguments about statistical methodology, etc., etc., there was also testimony relating to the fact that the U.S. tuna industry is, in fac, hoist on its own petard, or, if you prefer, aground on a shoal of its own making. Until the U.S. tuna fleet began switching (circa 1960) from traditional tuna fishing methods to the "more modern" purse-seining, it was sound economically, and the American public was supplied adequately with tuna products. However because of a desire to switch from a labor-intense industry to a capital intense industry, the fleet has acquired such horrendous fixed costs that, even in a bumper year such as 1976, many boat owners are making little, if any money. Economically speaking, the fleet hopes to limp along another few more years by continuing to slaughter porpoises on a massive scale; they have no long range plans, because, eventually, the porpoise and the tuna fish will be depleted. In brief, the economic ills of the industry hark back to the adoption of the setting of purse-seine nets on porpoise; and those ills can be ameliorated at best—never cured—by a continuation of the "efficient" but brutal practice.

Perfectly sincere representations of the various unions involved have loaded this hearing with endless sad tales and crocodile tears relating to the unemployment which will eventuate if the massive killing of porpoise is banned as mandated by the Marine Mammal Protection Act. The sad truth is that it is purse-seining itself which has greatly reduced the number of persons employed by the fleet; the man power per ton caught has gone down dramatically since introduction of the "modern" technique; that, in fact, is *why* it was introduced. One would think that the representatives of the unions would be supporting the environmentalists, not the industry. The situation is reminiscent of West Virginia in the 1930's and 1940's when John L. Lewis became a hero to the 10% of the well paid miners who kept their jobs but something of a bum to coal-miners in general. Again, in brief, it is purse-seining, not the Marine Mammal Protection Act, which has caused the large loss in jobs.

More crocodile tears were shed in the hearings over the fate of the American consumer. Somehow, his whole diet and well being would be seriously affected if the U.S. fleet could not set on porpoise. Also, he would pay a few cents more a can for tuna. This, again, does not comport with the facts. Late in the hearing and after some badgering, the Government produced these rather astounding figures (no Exhibit number): as to all canned tuna consumed in the U.S., in 1974 only 14% was yellowfin tuna caught on porpoise: in 1975 the percentage was 21: there are no figures for 1976. And how many Americans blindfolded could tell yellowfin from skipjack, or "light" from "white"? The real answer is that the American demand for "tuna" can be met without the slaughter of a single porpoise—and that is exactly what Congress had in mind. There are other types of "tuna" to be caught and other methods to catch yellowfin.

The whole tenor of the hearing revolved around an intense worry over the economic health of the tuna fleet; very little real concern was evinced on the part of most witnesses over the health of porpoises. We know, of course, that the Court is well aware of the express opinion of both the District Court and the Court of Appeals as to the priorities set by the MMPA. Equally, we know that the Court is well aware of the problem of overfishing in tuna—in addition to the slaughter of porpoise.

PROPOSED FINDINGS OF FACT

1. Until approximately 1959, there was an adequate supply of tuna (including yellowfin) for domestic consumption without the killing of any porpoise "incidental" to commercial tuna fishing.

2. Under Section 101(a)(2) of the Marine Mammal Protection Act (16 U.S.C. § 1371(a)(2), the Congress gave the tuna fleet a grace period of two years, beginning October 21, 1972, in which to solve the "incidental" kill of porpoise, but stated further that:

". . . In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate."

3. The legislative history of the Marine Mammal Protection Act clearly shows that the two-year period of grace was given on the assurance that the incidental kill problem was on the verge of solution and that it would be solved within that period.

4. The "incidental" kill problem is far from solved at present, upwards to 100,000 porpoise having been "incidentally" killed by the U.S. fleet in 1976.

5. At the current time, approximately 80% of the worldwide slaughter of porpoises is perpetrated by the U.S. tuna fleet.

6. There has not been a single enforcement action taken against any U.S. vessel or citizen with respect to taking of porpoise since the Act came into effect in 1972.

7. There is no figure for proposed "take" in 1977 in the Federal Register announcement of proposed regulations (Oct. 14, 41 F.R. 45017, Col. 3, *et seq.*); the only mention of a figure is that of 29,290 which is contained in what might best be called a "preamble" or "explanation" of the proposed regulations; and, further, the proposed regulations [in Section 216.24(d)(2)(i)(A)] contain this open-ended provision: "The Director may change the maximum number of marine mammals that may be killed, as specified in the general permit, whenever new information becomes available which results in the re-evaluation of the population or OSP level of any stock or species." Thus, the proposed regulations and general permit will in effect be open-ended as in years prior to 1976.

8. The number 29,920, even if it were firm (which it is not) is not an "insignificant level approaching a zero mortality and serious injury rate" which is the "immediate goal" of the Marine Mammal Protection Act [16 U.S.C. § 1731(a)(2)].

9. Certain species and stocks are either "depleted", "threatened", or "endangered"; among these are Fraser's dolphin, Risso's dolphin, rough-toothed dolphin, and short-finned pilot whale, who according to the Government's own statistics respectively have total populations of 7800, 7500, 450, and 60,000. [41 F.R. 45016, Col. 1].

10. Equally, there are certain species for which no population levels have even been estimated; these are the coastal spotted dolphin, Costa Rican spinner dolphin, melon headed whale, any pygmy killer whale. [Ibid].

11. There is not one single species or stock out of seventeen for which a concrete OSP figure is given; for the most part they are listed at AOA which translates into "at or above" [41 CFR 45016, table at top of columns 2 and 3].

12. There is a tentative "quota" for some species as low as five animals; there is no way to divide these among 120-plus vessels which will be included under the general permit. [Unless the ATA manager is wiser than Solomon, this task will be beyond him.]

13. The regulations contain no fixed provisions for observers and/or enforcement personnel on the tuna boats which will set on porpoise under the general permit.

14. The regulations provide for no observers on foreign purse seiners who set on porpoise and export tuna to the U.S.; thus, there will be absolutely no way to know what methods are being used by foreign fleets or when the total "foreign quota" is met.

PROPOSED CONCLUSIONS OF LAW

1. That under the Marine Mammal Protection Act, the welfare of the marine mammals is to be given primary consideration; other considerations must be relegated to *at least* second consideration. (Opinion of Judge Richey, at p. 22; affirmation of the Court of Appeals, at p. 14–15).

2. That the Marine Mammal Protection Act anticipated economic harm to certain industries where protection of the marine mammals required it. (Opinion of Judge Richey, at p. 28–29.)

3. The proposed regulations for 1977 do not comport with either the requirements of the Marine Mammal Protection Act or Judge Richey's interpretation of it, for the following reasons:

(a) There is no hard and fast quota for 1977; only a suggested or tentative figure of 29,920 in the "preamble", plus a specific regulatory provision which would permit unlimited alteration by fiat of the Secretary any time during 1977.

(b) OSP should not be a percentage of anything; it should be the equivalent of the pre-exploitation population; if one million white belly spinner porpoise existed before purse-seining, *ipso facto*, their optimum sustainable population should be one million; their environment *could* and *can* sustain one million; this *is* optimum. Until the pre-exploitation levels are determined, a moratorium should be enforced under terms of the Act [16 U.S.C. § 1373(d) (1) and (2)].

(c) Subsections (d)(1) and (2) of 16 U.S.C. § 1373 also require statements as to existing levels of population as well as optimum sustainable population figures; the specific provisions of the Act are not satisfied in the published data and the data produced at the hearing; existing levels of population are missing in regard to four species; OSP is not stated in numbers but either in "ranges" or "at or above" terms; neither of these is acceptable compliance with the provisions of the Act.

(d) The tentative figure of 29,920 is not an insignificant level approaching zero. [16 U.S.C. § 1371(a)(2)].

(e) The killing 29,920 porpoises is to the "disadvantage" of the porpoises and is forbidden by 16 U.S.C. § 1373(a).

(f) The simple prohibition against setting on "mixed schools" is insufficient to prevent the harassment or killing of certain depleted, threatened, or endangered species of marine mammals which are associated with yellowfin tuna, including Fraser's dolphin, Risso's dolphin, etc.

4. Both the "preamble" and the proposed regulations speak in terms of limited "take" of porpoises (see the table at the top of p. 45016 which refers to "Proposed allowable take by U.S. vessels"); under the definition section of the Marine Mammal Protection Act [16 U.S.C. § 1362(13)] "take" includes "harass", "hunt", "capture", etc.; it is unclear whether the regulations and/or permit anticipate an initial "take" of 29,920 or a mortality of 29,920. After all, individual porpoises are hunted and captured many times during a season. If the 29,920 figure is for "take", that is one thing; if it is for "kill", that is an entirely different matter. It is presently unclear.

5. There is nothing in the Marine Mammal Protection Act or its legislative history which would prevent National Marine Fisheries Service from conditioning a permit on acceptance by the permittee of an observer on every vessel on every voyage.

6. If valid regulations are even proposed and issued they must contain figures for species and stocks and not aggregates.

7. The proposed regulations do not provide adequate provisions for the policing of foreign ships setting on porpoise and the banning of imports from countries with lower standards than the United States [16 U.S.C. § 1371 (a)(2)].

CONCLUSION

FOA and CHL believe that the record clearly shows a failure of both the Government and the tuna industry to propose regulations which fulfill the requirements of the Marine Mammal Protection Act per se and as interpreted by the Courts. For that reason, we urge the Administrative Law Judge to advise the Secretary (a) to reject the proposed regulations and (b) if deemed advisable, to publish new proposed regulations for further consideration.

Respectfully submitted.

BERNARD FENSTERWALD, Jr.,
Counsel for the Friends of Animals
and the Committee for Humane Legislation.

Mr. FENSTERWALD. I would like to make a few comments.

I am one of the prime litigants before the courts now, and I would like to say that I am not even vaguely embarrassed by the court battle that is going on. I think what has happened in the courts in the District of Columbia is very encouraging. Whether you approve of the regulations that the Commerce Department has put out or not, I think it is encouraging to find that the courts are going to force the Government to enforce an Act of Congress, whether it is a popular one in all quarters or not. This is one of the few strong examples that I have seen where the courts have said this is what the Congress says, it is the law, and we are going to enforce it.

That does not embarrass me at all.

If the Congress does change the law, of course, the courts will have to interpret a new law.

I would also like to say that I think there are a number of groups in this country, who are not represented here today, some of whom have been represented in the administrative forum and in the courts, but who at the moment are remaining silent, who might agree with me that we are still of the opinion that the setting on porpoise and the kill of porpoise is wrong, and that what the Congress did in 1972 was to give the industry a 2-year grace period in which to find some way to set on porpoise without killing them.

The 2 years went by and they have not succeeded.

We are now into the fifth year, the kill is going on roughly at the same rate it was in 1972 when the act was passed. It goes up and down slightly, but at an annual rate of approximately 100,000; it was at an annual rate of 120,000 in 1976.

I certainly do not see any great decline.

I certainly do not think 100,000 is an insignificant number. I do not think it is approaching zero. And, frankly, I think most of the talk here that you have had today concerning all of the improvements of gear and the *Elizabeth C. J.*, and all the rest of it, is very similar to the talk that we heard when the act was passed. They were given the 2-year grace period because of all the optimistic talk about how the killing of porpoises was virtually solved and "give us 2 years and we will be all right."

I do not think things have changed much.

There have been some refinements and improvements, but at an annual rate of 100,000 to 130,000, I do not think the promises are even vaguely met.

I think the committee should remember that people have been catching yellowfin tuna literally for thousands of years without killing a single porpoise. This whole slaughter business started as late as 1958 or 1959. You are not talking about some historical precedent that we are about to undo. This is an American invention. It is one that is slaughtering the porpoises in great numbers, and it is one that is not necessary to catch yellowfin.

I also believe very strongly that the American public frankly does not know the difference generally between white meat tuna and light meat tuna. It is a matter of enormous importance to the industry, but so far as the public is concerned, their whole day is not going to be ruined if their tuna fish sandwich is made out of white tuna instead of light tuna.

I think the public has made quite clear to the Congress before, and I hope it will continue to do so, that if the cost of saving the porpoise is eating a little less tuna fish or eating white meat instead of light meat, or paying a few cents more a can, that they are willing to do that.

I think that it is simply economic greed which eevntually not only is going to do in the porpoise but also many other animals on the face of the globe. We have had startling experiences of it. The whale is an example. We no longer catch whales. Any U.S. citizen catching whales is violating U.S. law.

When Congress passes a piece of legislation that is designed to save a species of animal, there is going to be some pinch. In this case there is going to be some economic hardship on the American tuna fleet, but there are other ways of catching yellowfin tuna.

Up until 15 years ago, all yellowfin tuna was caught by another method. Today most of the foreign fleet uses other methods. There are other methods almost as modern as purse seining, which is the only method I know of that results in a needless slaughter of a huge number of very intelligent and very friendly creatures. Floating objects in the water are used by the Japanese; and sonar can be used. There are other ways of catching yellowfin in nets without setting on porpoise. It just happens that setting on porpoise is the easiest way, and I think that the Congress said in 1972, and I hope what it says today, is "cut it out."

What I have may sound completely strange and apart from all the arguments you have heard today. All you have heard today are the refinements, that is, how can we get the killing down from 125,000 to 95,000, or to some other large figure?

The committee for humane legislation and Friends of Animals are opposed to setting quotas.

If the industry cannot find a way or has not been able to find a way in 5 years to set on porpoise without killing them, we think it is time that the act not be weakened but strengthened and I will make some suggestions for strengthening it.

Another point that I have not heard mentioned at all, at least not in this context, is that the original act does not alk only about the killing of porpoises, but the "taking" of porpoises, which encompasses the hunting, capturing, and harassing. By a very simple calculation, using the Government's own figures, there are roughly 5 million porpoises that were caught in the nets last year.

How do I arrive at that conclusion? Let us take 100,000 just as a rough figure as the number that were killed. That represents somewhere in the neighborhood of 2 percent of those caught. In other words, 98 percent are released each time. If 2 percent equals 100,000, 100 percent equals 5 million, is the number "taken."

I cannot help but think that this continuing capturing and releasing has a deleterious effect on those animals, it is very traumatic to be captured time after time after time, even if the animals adapt somewhat to it. You are changing their lifestyle and you are introducing a constant element of terror into the large populations of porpoise in this Pacific area, and I think Congress recognized that in 1972, and I think it should be kept in mind at this time.

I also believe that the provisions in the act relating to observers should be straightened out. It is the position of the Government that the observers can only be abroad tuna boats for scientific reasons. There is nothing in the act that mandates that, but that is their conclusion. They are very reluctant and will not put observers on board strictly for enforcement purposes.

If we are going to save the porpoises, we have to have one observer on each boat on each voyage on those tunaboats that set on porpoises. I think, if necessary, those can be paid for by the industry itself. There is nothing to prevent this.

Lastly, I think that the import provisions in the law should be clarified, because, at the moment, it is not clear whether it is fish that was caught by standards less than ours, or fish from fleets with standards less than ours that should be kept out; and I think that point should be clarified, because at the moment I do not think that the law can be intelligently enforced.

If the committee would like, I would submit some amendments to the act. Although I understand this is an oversight hearing and not a legislative hearing. However I could submit them to Mr. Spensley, if the committee would find them helpful.

Mr. Leggett. Good. We would be pleased to have all the amendments that you would be interested in, and we certainly will consider those and your views on the lack of enforceability of the embargo are appreciated.

[The following was received for the record.]

Proposed Amendments to the Marine Mammal Protection Act

Section 3(12) is changed to read as follows: The term "secretary" means the Secretary of the Interior as to all responsibility, authority, funding, and duties under this act with respect to all marine mammals.

Section 101(a)(2) of the Marine Mammal Protection Act (16 U.S.C. 1371 (a)(2) is hereby amended to read as follows:

"The incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations is hereby terminated and no more permits shall be issued persuant to section 104 of this title. As a prerequisite to the domestic landing of fish by a U.S. tuna seiner, there shall be a sworn certificate by an observer, who shall have been placed aboard by the Secretary for the whole cruise on which the fish were caught, and who must certify that no nets were set upon porpoise during the cruise. The Secretary of the Treasury shall ban the importation of tuna in whatever form from countries whose tuna fleets contain purse seiners unless and until he shall have made a thorough investigation and published in the *Federal Register* his conclusion that the laws and regulations of that country are as stringent as U.S. laws as to the taking of porpoise, and that those laws and regulations are in fact being enforced."

Add a new subsection at the end of Section 101 as follows:

"Other provisions of this title notwithstanding, no permit shall be granted which authorize the placing upon marine mammals any tags, marks, or tracking devices of any sort."

Section 101(b) of the Marine Mammal Protection Act (16 U.S.C. 137(b)) is revoked and subsection (c) is redesignated as (b) throughout the title.

Section 102(b) of the Marine Mammal Protection Act (16 U.S.C. 1372(b)) is hereby amended to read as follows:

"(b) Except pursuant to a permit for scientific research issued under section 104(i) of this title, it is unlawful to import into the United States any marine mammal or marine mammal product, including but not limited to finished suede if such an individual mammal was:

(1) pregnant at the time of taking;

(2) nursing (whether obligatory or otherwise) at the time of taking, or less than one year old, whichever occurs later;

(3) taken from a species or population stock which the Secretary has, by regulation published in the *Federal Register*, designated as a delegated species or stock or which has been listed as endangered under the Endangered Species Conservation Act of 1969; or

(4) taken either by clubbing to death or in any way deemed inhumane by the Secretary."

Add a new subsection 102(c)(4) to section 102(c) of the Marine Mammal Protection Act (16 U.S.C. 1372 (c)) as follows:

"(4) any fur or leather of any species, in raw or finished form, from any country which such importation has permitted the taking of any marine mammals which at the time of taking are either nursing (whether obligatory or otherwise) or less than eight months old, whichever occurs later."

Mr. LEGGETT. It is obvious, of course, you indicate that the Japanese do have methods of deterring the porpoise and yet the Japanese eat as many porpoise as we kill. I think the evidence is something like 70,000 per year. We are out of the whale business, but the great progress made by the International Whaling Commission is setting the take of whales, I understand this year, of something like 35,000.

So unilateral action by the United States in many of these areas can set a precedent, can be inspiring, but also we have got to keep the carrot, I think, in reasonable proximity to the goal that we are currently playing.

Mr. FENSTERWALD. I wonder if I might comment on that, Mr. Chairman?

I think in the case of the porpoise, we are setting exactly the reverse standards for the world. It was the United States that invented this technique of fishing on porpoise. It is the United States that is killing, still killing 75 percent of all the porpoise killed. In the case of the whales, we quit first, and we said to the rest of the world, if you keep this up you are not going to have any whales left; and that has had some effect.

The rest of the world could easily say to us, if you keep killing the porpoises at the rate you are killing them, and you keep building more boats and keep taking more yellowfin out, you are not only going to run out of yellowfin, you are going to run out of porpoise.

There are efficient ways of killing whales, but the result is that you do not have any whales left.

I think rather than setting a positive example for the world, in this case we are setting an absolutely negative example.

Mr. LEGGETT. As far as whales are concerned, the great progress made by the law of the sea last year is that we are now down to an agreement that we will only take the optimum sustainable yield of whales which happens to be 35,000.

Obviously, if you get into nomenclature, it would allow us to take the optimum sustainable yield of porpoise, and nobody would be happy with that, and we are not going to do that.

I do believe that we can reach the 10,000 number that Mr. Butler talked about, but I do believe that we should do it with as little confrontation as we can, keeping the wedge on the overall industry.

Now, were I to offer an amendment which might offer or suggest, with respect to environment and harassment as a violation of the law, which I am pleased to do, I just do not think that, from what I know, this committee probably would not pass. In fact, I think you would get maybe no votes and maybe one.

Where I would bring it up on the floor, I do not think it would be many votes in support of it; but, again, what comes up would be subject to an open rule. So you have got to harken back.

I do not know how long you have been on board this overall effort, or whether you were one of the original lobbyists for this law.

Mr. **Fensterwald**. I was.

Mr. **Leggett**. And I was a member of the committee when that came up, and I know, as a member of the committee, we were concerned that the tuna industry not be put out of business, but that they adopt new methods; and I think Mr. Dingell has made statements in the Richey decision, and others, that seem to support that conclusion. We did not intend that purse seining would come to a screeching halt at the end of 2 years.

I am not satisfied with the take of porpoise of 120,000 at an annual rate or with an Administrative Law Judge's decision of 95,000, and I would like to get formidably down to very low numbers of porpoise, consistent with the objectives of the Act.

I think there are ways to get down there, but I think we do have to recognize that everybody slept on this law for two years, and then, all of a sudden, we, as a result of some litigation, as a result of action by this committee, we determined that we could move more formidably.

We do have a spectrum of thought as to where we ought to be right now.

The industry would like to go back to operations on the grace period. You would like to go back to operations pre-1958, and Mr. Butler wants the upbeat, we want to achieve a court solution on a temporary basis, but a court solution is not possible on the question of whether we want a congressional solution.

So that is kind of where we are at.

Mr. Anderson, do you have questions?

Mr. **Anderson**. You said it very well.

Mr. **Leggett**. Mr. Spensley?

Mr. **Spensley**. I just want to ask one question of Mr. Fensterwald who has lobbied for the legislation, one who certainly litigated it, and knows the act quite well.

Do you find an inconsistency in the Marine Mammal Act with respect to one goal which was to return and maintain all mammals at an optimum sustainable population and thereby imply a certain take of that level and, on the other hand, in the case of incidental taking in this case, porpoise, a goal reducing to incidental levels approaching zero?

Is there inconsistency there in your mind?

Mr. FENSTERWALD. I do not think so, because I think if the setting on porpoise were to—I started to say cease today, it is supposed to be ceased, I have some serious doubt as to that; but leaving that aside—it would take a number of years for the porpoise population to get back to pre-exploitation levels, which is what you are talking about, I think.

I would think there have been somewhere in the neighborhood of 16 to 17 years of slaughter. It would take some time to get back to the existing levels before exploitation.

At that time the Congress might want to come back and change this provision and allow a certain kill above that level. In other words, to hold it down to that level. But that is a long time in the future. Because there have been massive slaughters for 15 or 16 years.

Mr. SPENSLEY. The Act spoke of incidental taking of marine mammals, it did not single out the porpoise, although it did refer to commercial fishing.

Are you suggesting then that the killing of porpoise was the reason that they set that immediate goal in the Act on the Senate side?

Mr. FENSTERWALD. The Act, as it was origially drafted, did not have special provisions for the tuna fish industry in it, and I think that you will find, as in many similar instances, where you take a particular item and just put it into an Act, that it does not mesh completely, and there are certain technical inconsistencies between it and other provisions of the act.

I think the basic provisions were that the tuna fish industry would be given 2 years in which to get techniques whereby the captured porpoises were not killed. They have not done that.

I think it was realized all along, and I think it is true today, that there may be such techniques invented and there will be some minor incidental kills for which permits and regulations are not necessary, but we are not anywhere near that situation today.

Mr. SPENSLEY. Let me ask one final question.

Would your clients be satisfied if it could be shown that porpoise have been returned to an OSP level, and that what was taken would be in excess or above the OSP?

Mr. FENSTERWALD. I do not know if I can answer that completely, because of the difference of opinion that seems to exist as to what OSP is.

I have been firmly of the opinion that OSP is the pre-exploitation level, but in an effort to find some way around this act, the scientists have come up with all sorts of other definitions, ranges, and other things; but the environment did support x number of porpoises in 1975. I would think that would be the optimum sustainable population, whatever that figure may be. I cannot find anyone in the scientific field that seems to agree with that. I think that is what the Congress had in mind, but I think in an effort to get around what Congress had in mind, we completely lost sight of what OSP is supposed to be, and I think it would be helpful if the act is revised to put a clearer definition in the act as to what level you have to get back to before you could start killing again, because, otherwise, we will get into another 5 or 10-year argument as to what the Congress had in mind.

Mr. BUTLER. If I could give a brief answer for the groups that I represent, or that I am speaking for here today.

I do not think they would be satisfied, even if they could be shown that all porpoises were above the OSP level, for killing to continue at its presently existing level.

The reason for that is as follows: There are two goals in the act. One is the scientific goal of maintaining OSP; the other is the ethical goal of approaching a zero kill.

The zero kill goal connected with incidental taking. That is take which is not intentional, which is not usable, which is purely gratuitous, and which results in enormous waste of a natural asset.

Under no circumstances can such be tolerated over a long period of alternatives are available—that sort of killing, I think, is generally abhorrent to everyone in this room. For that reason, regardless of whether it is porpoise or seals caught in Alaska in the same way, if there are means to avoid that sort of incidental and useless killing, it seems to me the ethical goal is still to reduce taking to levels approaching zero, and this is not inconsistent even if population levels are at OSP.

You have two mutually complementary goals in the act. The ethical goal applies specifically to incidental. unintentional killing.

Mr. SPENSLEY. Incidental taking is important, because it is something that can be avoided, but intentional taking is all right ethically?

Mr. BUTLER. The argument for taking is far more persuasive if there is a purpose and use for killing the mammal. If it is eaten or commercially utilized—if something of this nature can be manifestly shown about the specific use to which the animal is put, that is one thing, but just gratituous killing, incidental killing which can be demonstrated is available, I think is abhorrent to all of us, regardless of what the species of animal is that is being killed. The Congress was groping with that particular thought in the Harris amendment in the Senate to the act, the amendment we now know as the zero kill goal.

I think it represents an important thought for Congress and the public at large that gratuitous killing is abhorrent, particularly when it is unnecessary.

Mr. LEGGETT. I think the committee agrees with that position. I think the wasting of an animal population is abhorrent.

Mr. FENSTERWALD. Might I add one more?

Mr. SPENSLEY. I would like to get an answer from Mr. Fensterwald.

Mr. FENSTERWALD. I am going to try to answer it directly, if I can.

My clients are opposed to setting on porpoises. If we go back to methods which do not require nets to be put around porpoises, we not only avoid the killing. we also avoid the harassment.

I think that the methods which we used prior to 1958 give us a reasonable supply of yellowfin. I think there are many, many other types of tuna fish that are caught in addition to it and yellowfin can be caught by other methods.

It would be our position, since there does not seem to be any way to get techniques that do not harass and kill if you use the nets, that we should go back to the methods before 1958. I think the chairman was exactly correct when he said that basically seems to be my position.

Mr. Spensley. I do find it ironic that on the one hand ethical for us to kill porpoise so long as we utilize them for food, even if we had other sources of foods.

But on the other hand, unethical to kill them in the process o catching fish despite the benefit derived therefrom.

Mr. Leggett. Well, that goes back to the hunter, that you do not shoot anything that you do not eat.

I think that there is certain amounts of natural justice in that kind of concept. So I think that we have asked these witnesses enough questions today?

Mr. Hodges?

Mr. Hodges. Yes. Would it be proper to bring up one matter of clarification?

There have been some numbers that have been mentioned today about a plateau of 125,000 that have——

Mr. Leggett. Could you use the microphone there? It might be helpful.

Mr. Hodges. With respect to the—I do not have the exact testimony before me, but it is my understanding that there are certain statements concerning the plateau of around 125,000 or 130,000 that have been killed. I am not quite sure how this was calculated.

Mr. Butler. Mr. Hodges knows perfectly well how they have been calculated.

They were calculated starting when this act first became applicable to the tuna industry: in 1974, 99,000 killed; 1975, 135,000; 1976, 104,000 for 10 months, for an annual rate of 130,000.

Mr. Hodges. That is what I wanted to address, because what Mr. Butler has done is to take the 104,000 which was—in other words, if that quota had been met, it would have been met in 1 month. There were 104,000 killed in 1976. Whether or not it was met in January, February, March, April, May, June, July, August, September, or October, I do not think it is correct to inflate the 1976 numbers up to 125, 130 and into something greater than they were.

Mr. Leggett. I understand what he was doing. He was talking about whether or not we were getting any better, and of course the answer to the question of whether or not we are getting any better, according to gross numbers, is that you do not measure it by gross numbers of porpoise, you measure it by gross tons of tuna caught.

That does not really make much never-no-mind with the porpoise that happens to be slaughtered.

Mr. Hodges. That is the point I am making. The point that I was making was that—precisely that, but that the number was 104 with respect to 1976, and, in addition, the act did apply to the tuna industry in 1972 and 1973. There was no permit that was required during those 2 years.

The act applied in tha there were subregulations and supposed to be regulations in those 2 years.

For the years, 1971. the year before the act was put into effect, it was approximately 312,000; 1972, about 306.000; and 1973, I do not have the exact figures. I believe it was around 175.000. I will stand corrected by what the record says. 1874—well, the figures were around 97, 98. 1975, 134,000 and 1976, the latest calculation was 104,000.

Thank you very much.

Mr. Leggett. The point is that we have not had a straight-line decline.

Mr. Hodges. That is absolutely correct. It has gone down.

Mr. Leggett. Which is the bothersome problem of the Committee.

Mr. Hodges. There are factors, Congressman, such as the change. change in fishing conditions that do affect this decline, but again, if you do look at the progress that has been made, I think the overall progress that has been made has been quite substantial.

We look forward to continuing the progress in the future.

Mr. Leggett. Very good.

Mr. Felando?

Mr. Felando. Yes, this sort of reminds me, Your Honor, of the 3-week session we had before the administrative law judge, with Mr. Fensterwald and Mr. Butler. Because of the fact that the record of these hearings have appeared in briefs and other arguments later on, I just want to make clear for the purposes of this record that I reject the argument made by Mr. Fensterwald that at least the American Tunaboat Association, I believe this is true for the rest of the industry, we did not promise that this problem would be solved in 2 years. There was a statement made by Captain Medina before one of the Committees, either on the Senate side or House side, in 1971.

I would just like to clear the record, that we do reject this argument because I do not want someone to say that this argument was made, this assertion was made, and by our silence we accept it.

Mr. Leggett. Very good.

Well, it is not up to the Congress to interpret its own laws. Maybe that is well and good.

Gentlemen, I think that is sufficient for now. It has been very helpful, and, Ms. Forkan, you have got your hand up and I am going to call on you now to present your case in chief on behalf of the Human Society of the United States, and you are the Program Coordinator. You have testified before us a number of times.

STATEMENT OF PATRICIA FORKAN, PROGRAM COORDINATOR, HUMANE SOCIETY OF THE UNITED STATES

Ms. Forkan. Thank you very much.

Mr. Leggett. Ms. Forkan, you can proceed and present your case and ask any questions you are going to ask.

Ms. Forkan. Yes.

I was going to object to this kind of correction of the record from the floor, which did not occur when the other groups were testifying.

Mr. Leggett. You are making a point of order, then?

Ms. Forkan. Yes. And I wrote down during the day things that I disagreed with and I would have jumped up and clarified points as they went along, Mr. Chairman, if I had a chance. So I do not think that should be a part of the record. I think they should be obligated to submit that in writing at a later time.

Mr. LEGGETT. All right. Your point of order is noted.

Ms. FORKAN. And I would respectfully ask that, since we always end up, or I always end up at the end of the day testifying, that you might speak with the parking lot attendant and have them stay open after 6 o'clock. It might solve a lot of problems.

Mr. LEGGETT. Well, I will see that counsel sees that your car gets out of the lot.

Ms. FORKAN. I appreciate that.

Mr. Chairman, as you have noted, I have been here many times before today. And anticipating that I would be late in the day and anticipating many of the things I wished to say would have been said, I made my statement very short and wish only to point out some things that I have been noticing both since the last hearings and also today. Particularly it is almost impossible to follow all the administrative hearings and court cases and the media assaults and the day-by-day things going on in the tuna industry. And we are hearing rumors of all kinds of lobbying going on. I cannot help but wonder if all that energy and that blocking of cooperation that has been going constantly on, if that had all been put into solving the problem, I think we would be further ahead than we are today; and we need to put money into efforts that are going to solve the problem and not constantly block everybody's attempts.

For instance, today we saw a film produced by the tuna industry that was most upbeat—talking about upbeat—and in fact, when I saw that, I thought to myself: "Why am I here?" According to this film, everything is wonderful.

The scientists, everybody, they are all out there working. Things are really happening. Implying everything is solved.

But yet on the other hand, Mr. Chairman, when you listen to the testimony the problems are not solved and read the briefs presented to the Administrative Law Judge, the industry is asking for quotas of 98,000, which is much higher than the quota we had last year of 78,000. They ask for a quota on an aggregate basis with which most scientists disagree rather than a species-by-species and stock-by-stock.

They are willing to turn away from evidence that states that the eastern spinners are depleted. They ask to kill that particular population. And I do not see how this is cooperation. It is just incredible that after all of these hearings and court actions and great cost to the American taxpayer, it is incredible that the industry would still resist the notion of an enforcement program with observers on every boat. In fact, in their brief before the Administrative Law Judge they supported only a "scientific observer program," and they opposed observance for enforcement purposes. I do not understand how that is cooperation like I saw on the film.

I understand the dedicated vessel is still floundering. No one seems to know when or if that is going to happen. Are they actually going ahead?

I am encouraged to hear today that many of the boats have ordered the webbing. I think that is encouraging. I think they should go ahead and not wait to be ordered to adopt poropise saving devices, but to go ahead and adopt these things.

And I want to commend Captain George for his wonderful cooperation. I understand he is most skillful and his crew is. I think that is fantastic. Why can't all captains and crews do as well? We are tired of just constantly going to the courts and to hearings. Let us just get down to it.

We know a solution is near. And I think that makes us even more anxious to see this thing solved. We have been through it for 5 years, as you well know.

We think the captains who have demonstrated the inability or lack of interest in reducing porpoise mortality should be put on probation or they shoud not be allowed to fish. Let's say "fish correctly or cut bait."

A full observed program is a must, both for enforcement and data gathering. And we absolutely agree the goal of near zero mortality is a good one. Please remember, we are a humane society. We must try to stop the harassment and torment and torture of a very intelligent and very social animal. And we just cannot accept 100.000 of these animals as near zero mortality. As a matter of fact, I wish Congressman Oberstar were here; because he kept saying, "Well, there are 5 million or eight million." But as we heard from Bud Fensterwald, approximately 1.4 of all of the porpoises out there are set on every year. I think this is incredible. We have to do something about this kind of cruelty.

So in the meantime, because the fleet and the industry have been on notice to solve the problem since 1972 and they still want to kill nearly 100,000 dolphins this year, our membership continues to participate in a boycott of all tuna products.

In fact, the Kind Club, which is our junior division, has many youngsters going to the school cafeterias asking that tuna not be part of the menu.

And I have a package here that the kids wanted. They kept writing saying that "We want to do something and want to do it very badly."

So we prepared a Kind Crusade to Save Porpoises. They got petitions and posters. Some of you may notice I am wearing a button that says. "I do not Eat Tuna: Dolphine Die in Nets," which is also part of the crusade.

So this is a growing crusade. I think the Congress should be aware of it. It has not been mentioned today at all, but the American public is interested in saving the porpoise.

I would like to submit these items for the record, if I might, so that you can see what it is that we are doing.

Mr. LEGGETT. Portions of those will be incorporated in our record.

Ms. FORKAN. Fine.

[The following was received for the record:]

KIND Crusade to Save Porpoises

WHEREAS, each year porpoises drown by the hundreds of thousands in the nets of the tuna industry; and

WHEREAS, the Marine Mammal Protection Act provides excellent protection for porpoises if the Act is properly enforced; and

WHEREAS, any attempts to weaken the Marine Mammal Protection Act will threaten the survival of porpoises;

THEREFORE, we, the undersigned hereby support a policy of NO CHANGES in this Act, and respectfully request the Congress to uphold the Act as it stands and insure its proper enforcement.

NAME STREET ADDRESS CITY STATE ZIP

Add more pages as needed. Return signed pages to KIND, The Humane Society of the United States, 2100 L Street, N.W., Washington, D.C. 20037.

KIND Crusade to Save Porpoises

WHEREAS, each year porpoises die by the hundreds of thousands in the nets of the tuna industry; and

WHEREAS, efforts by the Congress of the United States to protect these and other marine mammals by the enactment of the Marine Mammal Protection Act have been nullified by the issuance of special exemptions to the tuna industry, and by other actions in disregard of Congressional intent; and

WHEREAS, it appears that a massive expression of public opinion in the form of a boycott of all tuna and tuna products may be the only recourse if porpoises are to be saved from becoming extinct;

THEREFORE, we respectfully request that owners and operators of restaurants, cafeterias, hospitals, rest homes, nursing homes, day care centers, and schools adopt a policy that no tuna shall be served henceforth, until the problem has been satisfactorily resolved so that porpoises are no longer killed incidentally in the harvesting of tuna.

NAME STREET ADDRESS CITY STATE ZIP

KIND Crusade to Save Porpoises

AN APPEAL FROM THE STUDENTS OF ______________________ SCHOOL

WHEREAS, each year porpoises drown by the hundreds of thousands in the nets of the tuna industry; and

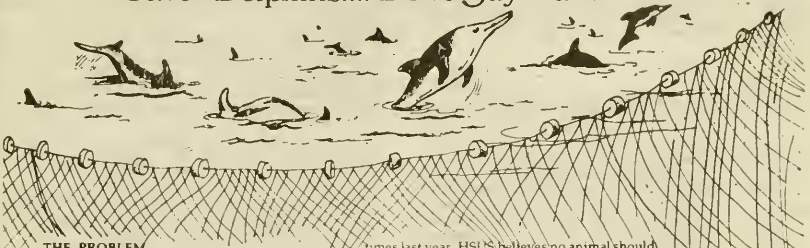
WHEREAS, efforts by the Congress of the United States to protect these and other marine mammals by the enactment of the Marine Mammal Protection Act have been nullified by the issuance of special exemptions to the tuna industry, and by other actions in disregard of Congressional intent; and

WHEREAS, it appears that a massive expression of public opinion in the form of a boycott of all tuna and tuna products may be the only recourse if porpoises are to be saved from becoming extinct;

THEREFORE, we, as students in your charge, respectfully request the School Board adopt a policy that no tuna shall be served in school cafeterias henceforth, until the problem has been satisfactorily resolved so that porpoises are no longer killed incidentally in the harvesting of tuna.

NAME	STREET ADDRESS	CITY	STATE	ZIP

Save Dolphins....Don't Buy Tuna



THE PROBLEM

For some unknown biological reason, yellowfin tuna swim underneath schools of dolphins. Tuna fishermen, aware of this association, can find the deep swimming tuna easily by spotting the leaping dolphins. Until the sixties, the hook and line method of fishing was used and dolphins were not disturbed. However, with the introduction of the purse seine net, dolphins have been brutally massacred by the *millions*. While there are several subspecies of dolphins and porpoise, it is the spinner porpoise, spotted porpoise, and the common dolphin which are being slaughtered by the Pacific tuna fleet.

The purse seine net is about ¾ of a mile long and is placed around the whole dolphin school and drawn shut like a drawstring purse entrapping everything including the tuna swimming below. This technique is also called "setting on" dolphins.

Dolphins are air breathing highly intelligent, social mammals. When they realize what is happening they panic and try desperately to escape. Instead, they get their snouts and fins entangled in the nets and drown, or are crushed and mangled as they are pulled aboard in the net. Some escape wounded and mutilated only to become prey to sharks, or the young die, having lost their mothers. Although it is estimated that 97% of all dolphins entrapped escape, the 3% which suffocated and drowned amounted to 134,000 in 1975. That does not include those injured. Moreover, it is estimated that *each* dolphin in the dolphin populations affected was chased and netted more than 14 times last year. HSUS believes no animal should be subjected to such torture and cruelty.

THE SOLUTION

The Marine Mammal Protection Act of 1972 is a federal act which includes a special section on the so called "incidental" killing of dolphins by tuna fishermen. It gave the tuna industry two years to develop new gear and techniques and to attain the goal of near zero mortality and injury of dolphins. At the end of two years, little progress was evident. In fact, more dolphins were killed in 1975 (134,000) than in 1974 (98,000). In late 1974, a number of conservation groups took the Government to court saying they were not upholding the law by allowing the continued kill of dolphins. On May 11, 1976, U.S. District Court Judge, Charles R. Richey, ruled the tuna industry must stop setting their nets on dolphins by May 31, 1976.

OBSTACLES

Judge Richey's decision was appealed immediately and the U.S. Court of Appeals has allowed the industry to continue purse seining until there's a new ruling*. In the meantime they can legally kill 78,000 dolphins during 1976. Since the tuna industry claims it will go out of business if dolphins can't be used, some members of Congress held hearings to try to pass a law to override Judge Richey's decision. Fortunately, nothing has passed *yet*. While the United States has demanded that other nations close down their whaling industries and abide

KIND

***At Press Time,**
The U.S. Court of Appeals upheld Judge Richey's decision but allowed the tuna industry to continue killing dolphins until January 16, 1977. The fight is now back in Congress so it's crucial you let your Congressman know how you feel to prevent any further weakening of the Marine Mammal Protection Act.

by a ten-year moratorium on killing whales, the U S. tuna industry continues to kill hundreds of thousands of these small whales (dolphins) annually

TUNA BAN

There is little hope for saving the dolphins either in the Courts or in Congress As long as the tuna industry claims they have to kill dolphins to catch tuna fish, it is unlikely the Government will make them stop However, the consumer can effectively influence the tuna industry by refusing to buy any tuna products until they solve this problem. The tuna industry will soon find it is cheaper to devise new fishing techniques than it is to not sell any tuna Patricia Forkan, HSUS program coordinator, stated in her testimony before the House Subcommittee that HSUS constitutents were taking steps on their own to save dolphins by boycotting all tuna products. "It is the only path left open to us "

Although it is only the yellowfin tuna (labeled as "light" meat) which is caught by killing dolphins, HSUS believes if the ban is to be truly effective, the economic sanction must be felt across the board. What good does it do to buy tuna not caught on dolphins such as white Albacore, or dark Skip Jack from the same company? They are still selling tuna. Also, it is not always easy to tell which is which. Remember not to buy any tuna pet food either.

TUNA INDUSTRY'S TASKS

- Develop new fishing gear and techniques that will truly reduce mortality and injury to near zero. This is crucial not only for U.S. fleets but also foreign fleets which have begun to use purse seine nets.
- Some tuna boat captains have better records than others. Regulations and a training course for them are needed to insure they comply with new methods. Captains who continue to kill dolphins should be fined
- Allow Government observers aboard all large vessels to insure they are following regulations, to count the number of dolphins killed, and to help determine the total population of dolphins
- Provide a full time research vessel to the Federal Government for continued testing
- Be more concerned about conservation of the stocks of yellowfin tuna being rapidly depleted by the increasing numbers of big purse seine boats
- Realize the major reason they reduced mortality in 1976 by more than 60% was mother nature rather than improved fishing practices and "dolphin rescue" efforts. With tuna readily available this year without setting on dolphins at all, the tuna industry only set on them half as often as in 1975. Therefore, dolphin mortality is down. If fishing conditions had been normal this year it is estimated the total kill would have been reduced by only 19% from 1975 levels meaning the U S. tuna fleet would have killed 109,000 dolphins in 1976.

WHAT CAN YOU DO?

1. Join with HSUS in our fight to keep dolphins out of tuna nets.
2. Help educate your neighbors by handing out this leaflet, writing letters to the editor, calling radio shows, talking at your next humane society meeting or other local organizations, getting school clubs to help. Some student groups have convinced their board of education not to serve tuna in school cafeterias.
3. Let your Congressmen know how you feel.
4. Write to the President and ask him to invoke that part of the Marine Mammal Act which allows the United States to embargo any fish products coming from foreign countries not adhering to our laws protecting dolphins.
5. Write to the Presidents of these major canning companies and tell them why you are no longer buying any tuna products.

Del Monte Corp., Box 3573, San Francisco, CA 94119

Castle & Cooke (Bumble Bee, Cloverleaf), Astoria, OR 97103

H. J. Heinz Co. (Star-Kist), Box 57, Pittsburgh, PA 15230

Ralston-Purina (Chicken of the Sea), Checkerboard Square, St. Louis, MO 63188

Because a large number of members have expressed interest in the dolphin situation, this article was especially designed to educate and inform interested groups and individuals. Share this article with your friends and neighbors by reproducing and distributing copies of it. Courtesy of The Humane Society of the United States, 2100 L Street, N.W., Washington, D.C. 20037.

Patricia Forkan, Program Coordinator

Ms. FORKAN. I think that is all I really have to say.

As I said earlier, we have covered very technical things in previous testimony. I just wanted to point out a few of the inconsistencies that I keep seeing. We just want to stop the killing, and wish the industry would try harder.

Mr. LEGGETT. Let me ask just one question.

What number of porpoise take are you going to call off the boycott when it reaches that?

Ms. FORKAN. I think that is up to our members. We have had encouraging letters saying they are getting letters back from the industry saying how hard they are working. So we will watch and see just when it is honestly incidental. And I think there is such a place.

Mr. LEGGETT. Very good.

I think your testimony is very upbeat in spite of the fact that you are very critical. Your statement will of course be placed in the record.

[The following was received for the record:]

STATEMENT OF PATRICIA FORKAN, PROGRAM COORDINATOR, THE HUMANE SOCIETY OF THE UNITED STATES

Mr. Chairman, thank you for the opportunity to testify during these oversight hearings on the "tuna/porpoise" problem. I am Patricia Forkan, Program Coordinator for The Human Society of the United States, a national, non-profit organization dedicated to the relief of fear, pain, and suffering of all animals. We are, with respect to staff, program, constituents, and members, probably the largest animal welfare organization in the country.

The HSUS has come before this subcommittee many times before today in the hopes of getting down to the business of saving dolphins and porpoises and enforcing the MMPA. During 1976 it was almost impossible to follow the exhaustive administrative hearings, the myriad of court cases, the many media going into lobbying, without wondering why in heavens name the tune industry doesn't use all that time, energy, and money to solve the "incidental catch" problem once and for all?

On one hand tuna companies are writing to the public saying how hard they are trying, while on the other hand briefs are submitted to Administrative Law Judge Frank W. Vanderheyden asking for 98,000 porpoise as a quota for 1977 . . . a number far exceeding the 78,000 quota for 1976. Contrary to all scientific testimony they also asked for a quota on an aggregate basis rather than on a species by species and stock by stock basis. They are willing to turn away from evidence that shows the Easter spinner is depleted and ask to continually kill that population. Apparently, they forget that the Act is meant to protect marine mammals first.

It is incredible to imagine that after all these hearings and court actions at great cost to the American taxpayer that the industry would still fight the notion of an enforcement program with observers on every boat. In fact, the industry, again in its brief before Judge Vanderheyden, said they support only a "scientific observer program" and oppose any observers for "enforcement purposes." Is this the cooperation they refer to?

Where is the cooperation? Is the dedicated vessel underway? We believe its work will be crucial especially in solving some of the behavioral mysteries. Has the fleet begun preparations to adopt porpoise rescue techniques found to be so very effective on the Elizabeth C.J.? What are they thinking about when they threaten to leave the U.S. fleet . . . it's like the little boy who threatens to take his football home if you don't play the game according to his rules.

The public and our members are tired of the excuses and the footdragging. They want action . . . especially when they know a solution is near and is possible if the fleet and its captains really cared. When a goal is in sight . . . the demands to reach it are only heightened.

The fleet should begin with its own captains who have demonstrated the inability or lack of interest in reducing porpoise mortality. The inept captain should be put on probation and then relieved of his duties if he can't cut it.

A full observer program is also a must for enforcement and data gathering as well. We believe the MMPA is working and the near zero mortality and serious injury goal is a good one.

In the meantime, because the fleet and the industry have been on notice to solve this since 1972 and they still want to kill nearly 100,000 dolphins this year, our membership continues to participate in a boycott of all tuna products. Our junior division called the KIND Club has its members sending letters to newspapers, going to their schools with petitions to remove tuna from the school lunch menu, and sending letters to members of Congress. It is a KIND Crusade to Save Porpoises. Our supporters will begin wearing this button to proclaim the tuna boycott.

None of our members, young and old alike want the dolphins and porpoise to follow the same route as the great whales. We want to stop the killing before it's too late.

Mr. LEGGETT. Any other questions?

And will somebody see that Ms. Forkan gets her car?

Ms. FORKAN. Thank you.

Mr. LEGGETT. Mrs. Stevens, very nice to have you back.

Mrs. Stevens is from the Society for Animal Protective Legislation; and Mrs. Stevens is the secretary.

You have been before this committee of ours a number of times also and a large number of subjects. We are very pleased to have you here. And any time you want to go first—either you or Ms. Forkan or any others—let me know and we will put you up at the top of the list.

STATEMENT OF CHRISTINE STEVENS, SECRETARY, SOCIETY FOR ANIMAL PROTECTIVE LEGISLATION

Mrs. STEVENS. All right.

Well, I am perfectly happy to be at the end of the list because I can comment on some of the things that were said earlier.

I would like to just skim over my testimony.

Mr. LEGGETT. All right.

Your statement will appear in the record as though you fully read it.

[The following was received for the record:]

STATEMENT OF CHRISTINE STEVENS, SECRETARY, SOCIETY FOR ANIMAL PROTECTIVE LEGISLATION

The Marine Mammal Protection Act still awaits effective enforcement. The courts have called for such enforcement, and the recent cruise of the Elizabeth C.J. has demonstrated the feasibility of catching 900 tons of tuna with 16 dolphin deaths or less—most of the deaths having been attributed to scientific tagging and other research efforts rather than the actual fishing.

An excellent memorandum to all Certificate Holders was circulated on January 31, 1977 by Norman A. Mendes, Chief, Tuna/Porpoise Management Branch, National Marine Fisheries Service giving each the necessary information on how the skipper and crew of the Elizabeth C.J. accomplished this reduction in dolphin deaths.

With good will and serious effort to observe the dolphins in the nets and wait till all have surfaced in order to help them out, there can be no doubt that the lowest quotas proposed, can readily be met, and there will be no economic problems for the industry.

I would like to comment on certain aspects of the Administrative Law Judge's recommended decision.

FATE OF PACIFIC DOLPHINS

THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION

In a 156-page recommended decision on the 14-day hearings held on regulations under the Marine Mammal Protection Act, Administrative Law Judge Frank W. Vanderheyden accepted the statistics offered by Dr. William Fox, Jr., a National Marine Fisheries Service (NMFS) scientist who painted a rosy numerical picture of how dolphins could thrive while American tuna boat captains killed 96,000 "incidental" to their pursuit of the tuna in the Eastern Tropical Pacific in 1977. The decision was served January 17th.

In proposed regulations published October 1, 1976, NMFS recommended a greatly reduced quota—less than one third of the Judge's recommendation. But industry fought bitterly and successfully to raise it to a figure greater than the total kill of dolphins in 1976. Dr. Fox's testimony played a major role in convincing Judge Vanderheyden, contrary to the official recommendations of the government or the Marine Mammal Commission established under the Marine Mammal Protection Act.

To get the flavor of the type of statistical bureaucratese which seems to have tipped the scales against the dolphins a few excerpts from Appendix H of the decision, Dr. Fox's supplemental statement, provided expressly for the record, are given below:

"Because of statistical uncertainties the 'true values', for which we have estimates may actually lay (sic) above or below the estimates. For this reason statistitions compute intervals about the estimates for which a statement can be made that the 'true values' lay (sic) within their intervals with a certain level of probability. In order to make this statement, further assumptions are made regarding the correct probability model for the statistical uncertainties."

Or later: "We are reasonably confident that the sustainable kill is not less than this value in the same sense that we are reasonably confident that either the population size or net reproductive rate is not less than two standard errors below its estimate; this is a statistical convention."

The Judge stated flatly that the dolphins' "protection is assured by those levels of confidence recommended by Dr. Fox." (p. 86)

Further, the Judge concluded, "based on the testimony of Dr. Fox" that "the lower bound of optimum sustainable population is 50 percent of the unexploited population . . ." (p. 73) Even the International Whaling Commission uses 60 percent as the lower bound in computing its industry-oriented quotas for killing the great whales! The lower the percentage the more animal deaths are "justified."

With the dolphins at the mercy of this type of human cogitation, the outlook is grim. However, there are certain elements in the Judge's recommended decision (The Director of NMFS is the one who makes the final decision) which have value, and some of these are quoted below:

Five to six million dolphins killed

"The estimated total mortality of spotted dolphin between 1959 and 1975 was between 3,271,00 and 3,938,000. For the same period, the estimated total for the eastern spinner dolphin was between 1,501,000 and 1,848,000 and the total mortality for the whitebelly spinner was approximately at 179,000." (p. 23) (Totals including '76 kill 5,025,000 to 6,049,000).

How the dolphins try to save themselves

"Porpoise themselves apparently have developed techniques to reduce their mortality. They have excellent memories with some schools being more alert than others. Also the schools act differently according to areas. One method they use to avoid being 'set on' is to disperse before the speed boats can herd them. Another tactic is for a school to submerge together and stay under the water as long as possible making their position difficult to determine and a set impossible. The degree of memory, intelligence and evasive tactics used is in direct proportion to the number of times they have been 'set on' and the interval between sets. Tr. 2303, 2307-09, 2330. The evidence is persuasive that a point can be reached where it is impossible to 'fish on' a particular school of these mammals." (p. 28)

NMFS takes its time but the judge calls for action

An account of some of the findings from the scientific observations on the "Elizabeth C.J." cruise showed what should be done. "As with floodlights, however, the NMFS states it has not had sufficient time since the hearing to determine the specific language of a regulation pertaining to faceplates or rubber rafts, but it *intends to continue to examine the problem.*" (Emphasis supplied)

The Judge states, "It is found that the use of floodlights during these types of sets will reduce mortality greatly. Therefore, as a start and at the very least it is concluded and recommended that the regulations should require that all vessels be equipped with adequate floodlights and that they be required to be used if the backdown procedures occur in darkness. It is also found that the use of rescuers on speedboats and/or rafts during sundowners lessen porpoise mortality. It is concluded and recommended that the regulations should require these procedures where the backdown occurs in darkness." The Judge further recommended ". . . Mandatory use of faceplates . . . and use of rubber rafts" and "two speed boats on all classes of vessels." (pp. 43-44)

Porpoise rescue foundation takes its time too

The Judge notes: "In a random survey of some 29 cruisers since May, 1976, it was indicated that 35 to 40 percent of the mortality was caused by three vessels. Take this chilling thought. In another instance, one tuna boat accounted for 15 percent of total porpoise mortality! . . . such carnage must cease." (pp. 50-51)

The industry-inspired Porpoise Rescue Foundation (PRF) seems decidedly less exercised, however." The PRF has analyzed the trips of vessels and it intends when time permits to consult with skippers of problem vessels. Problems stemming from stress, sometimes confusion and pressures from other matters, in the porpoise-tuna problem in 1976, have prevented the group from carrying out its tasks." (p. 45)

"As soon as determination of research projects vessel operations, costs and funding provisions are completed the industry will also dedicate a vessel for porpoise research in 1977. The dedicated vessel will be available for about 250 days at sea, . . . funded by the industry including the boat owners and cost about $2.5 to $3 million for 1977 . . . the cost of the dedicated vessel is correlated to the amount of yellowfin it catches. The greater amount caught, the less the cost, to a point where its cost of operation may be nominal."

Commenting on the NMFS proposal on suspension or revocation of skippers' certificates, the Judge wrote, "This is weak as water. There should be a more expeditious and certain procedure to deracinate those shown to be incompetent from fishing on porpoise. The spirit of the act demands nothing less."

The Judge recommended that the regulations be amended to get evaluations from observers as "to whether or not the certificate holder is performing according to the regulations." (p. 150) He supported the provision in the proposed regulations that "a certificate holder who fails to comply with the provisions of the permit and applicable regulations subjects himself to revocation of the certificate and/or the right to be included under a general permit and to the penalties provided in the Act." (p. 155)

Big, new tunaboats worst offenders

"The bigger, and particularly newer vessels . . . have large operating costs and fixed charges which are economic inducements to seek larger catches, many times in areas where porpoise associate with the fish. This is principally the reason why such vessels have high porpoise mortality," wrote the Judge.

"There remains always the possibility," he continued "of the seiners converting to bait boats. Although the conversion is possible, it would be extremely costly." (p. 105)

The whole concept of the huge new seiners was wrong to begin with. Millions of dolphins have been sacrificed to a greedy industry which now claims it is in financial straits. The Judge points out, "The larger vessels, particularly in the 1,100 ton capacity range will have the greater difficulties because they are relatively new and have large charges for interest and depreciation." (p. 109)

"In the late 1960's and early 1970's, size and carrying capacity of seiners gradually increased, with a few of the latest additions to the fleet capable of holding more than 2,000 tons of tuna. These new, modern, long-range purse seiners, sometimes called 'super seiners' cost about $4.5 million to construct, plus another $600,000 for outfitting. They are built particularly to fish on porpoise . . . Until recently, these large seiners caught approximately 2,000 to 4,000 tons of tuna per year worth $1-2 Million." (p. 114)

"There exists on about 104 seiners mortgages, liens and other encumbrances of nearly $206 million . . . held by banks and insurance companies. Such indebtedness would place a major obstacle to transfering the vessels to foreign flags." (p. 117)

However, three vessels did transfer in 1976, two to Mexico, one to New Zealand.

In enforcing the proposed import restrictions to force foreign purse seiners to adhere to the regulations the Judge recommended that "the regulation seek a certified list of U.S. citizens crewing foreign seiners." If U.S. citizens are not conforming to the regulations they are personally subject to the penalties of the Act—a fine of up to $10,000 and/or a year in jail. To date, however, there have been no fines nor any revocations or suspensions of certificates.

The time for enforcement, including penalties for the minority of skippers who are killing the majority of dolphins. It is clear that if NMFS insists that Certificate Holders take the Act and regulations seriously the entire problem will be solved.

Mrs. Stevens. All right; fine.

Thank you.

One of the things that struck me was so little has been said about the bad boats although there has been a good deal of publicity about it.

It was only at the very end of this hearing that this question really arose.

Mr. Chairman, you know I have often spoken about the fact that this law should be enforced and, if it would just be enforced, we would solve a lot of problems. If some of the bad captains actually go to jail or maybe some of the boat owners, who would have to pay a substantial fine going up to $10,000, we might get some place with this; but the National Marine Fisheries Service has never brought any case for prosecution against anyone in the tuna industry.

It is just incredible. It is as though this was something different from what the Congress passed.

As you know, a man who went out and caught 30 dolphins to sell for dolphin shows was prosecuted and had to pay a substantial fine. Now, what is wrong with having the bad captains of the bad boats be penalized? That is what is necessary. I hope that will be done.

Now, I would like to emphasize what has only been said at the very end of the hearing; that there has not been steady progress. There simply has not been. But it sounds now as if there could be great progress.

Progress on the *Elizabeth C. J.* and other progress we heard about today, Mr. Chairman, shows that if there is the will to do it on the part of all the captains, they can meet even the lowest quota that has been proposed, which is 29,920, I believe.

However, over a period of years it has been perfectly clear that there are quite a few captains who are not motivated to save the dolphins. I repeat what I have said several times at these hearings before: in 1974, 40 percent of the mortality was estimated to be because there were not two rescuers at the cork line as specified by the regulations. That did not require any great scientific expertise. All it required was the will to do it. And if there is the will to do it, they can do it.

Under the existing law, Mr. Chairman, it can be done. There is absolutely no necessity for changing the law. In fact, it would be a terrible mistake and a shame to our country if that should happen.

I would like to draw attention to a very excellent memorandum which I think was just briefly mentioned by Dr. Chapman of the Marine Mammal Commission. This memorandum is by Norman Mendez, chief, Tuna/Porpoise Management Branch, addressed to the certificate holders. It was issued on January 31. And although I only have one copy, I would like to submit it for the record.

Mr. LEGGETT. How many pages is that?

Mrs. STEVENS. Well, when you get to the signatures, that is page 7. There are also some tables here.

Mr. LEGGETT. Very good. That will be included in the record.

[The following was received for the record:]

U.S. DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
NATIONAL MARINE FISHERIES SERVICE,
San Diego, Calif., January 31, 1977.

FSW-34/NAM

DEAR CERTIFICATE HOLDER: A copy of the cruise report for the experimental charter of October 7 through December 9, 1976 aboard the tuna seiner M/V *Elizabeth C. J.* is enclosed for your information.

The experimental gear and porpoise release procedures used during the cruise resulted in a record low porpoise mortality rate of 0.09 porpoise per set and 0.004 porpoise per ton of yellowfin tuna caught.

We are greatly encouraged by the successful results of the cruise and are anxious to share it with you and your fellow fishermen. We urge you to review the report and to discuss it with others. The information it contains may be of great value to you in achieving our common goal of porpoise mortality reduction.

Sincerely,

NORMAN A. MENDES,
Chief, Tuna/Porpoise Management Branch.

Enclosure,
Distribution attached.

DISTRIBUTION TO 170 CERTIFICATE HOLDERS

Copies with enclosure also to the following:

MANAGING OWNERS

Ames, Robert E., Del Monte Seafoods, P.R.
Andrade, Manuel S., S.D.
Bieazivich, Paul, S.P.
Boettcher, Fred, S.P.
Brito, Lou, Ocean Fisheries, Inc., S.D.
Caboz, Manuel, S.D.
Castagnola, Louis, S.D.
Castagnola, Pete, S.D.
Cintas, Manuel, Apollo Fisheries, S.D.
Correia, Leo E., S.D.
Crivello, Thomas A., S.D.
Cutri, Cosimo L., Jr., Medina-Cutri Tuna Seiner Management Co., S.D.
Da Rosa, Chris, S.D.
De Silva, James, S.D.
Derrick, Richard, Pan Pacific Fisheries, S.D.
Dorsch, Charles C., Shreve & Hays, Inc., S.D.
Dunn, Mike, Van Camp Seafood, S.D.
Ferreira, Francisco R., S.D.
Gann, Edward, Caribbean Marine Service Co., S.D.
Gargas, Frank, Rancho Palos Verdes
Guidi, Agostino, S.D.

Guidi, Anthony L., S.D.
Guidi, Louis, Jr., S.D.
Hodgkins, Richard, Spring Valley
Jorge, Manuel S., S.D.
Kruger, Gary, Del Mar
Lira, Raul P., S.D.
Madruga, Joseph, S.D.
Mauricio, John, S.D.
McCarthy, Tim, Bumble Bee Seafoods, S.D.
Medeiros, Raymond O., S.D.
Medina, Harold, S.D.
Medina, Joe, Jr., S.D.
Mellusi, Jay, Westgate Terminals, Inc., S.D.
Mitchell, Edward, Zapata Ocean Resources, S.D.
Mittenen, Thomas W., S.D.
Nizetich, Anthony, Star Kist Foods, T.I.
Pasarow, Robert, Pan Pacific Fisheries, T.I.
Rodgers, Joe, Ramona, CA
Romani, Vito, S.D.
Rosa, Raymond, Zapata Ocean Resources, S.D.
Silva, Manuel A., S.D.
Silveira, John, S.D.
Sousa, Frank, S.D.
Terzoli, Manuel, S.D.
Trutanich, Nick, S.P.
Trutanich, Tony, Pan Pacific Fisheries, T.I.
Uhlein, Wyatt J., Agtek International, Inc., New Canaan, Connecticut
Virissimo, Alvaro R., S.D.
Virissimo, Roland L., S.D.
Whitney, Charles L., S.D.
Yeend, Arthur J., Trident Fisheries, S.D.
Zeluff, George N., S.D.
Zlotoff, Morty, S.D.
Zollezzi, John B., S.D.
Zollezzi, Julius, Sun Pacific, Inc., S.D.
Zuanich, John, Star Kist Foods, T.I.
Zuanich, Lawrence, Star Kist Foods, T.I.

INDUSTRY REPRESENTATIVES

Alverson, Frank, Porpoise Rescue Foundation, S.D.
Bozzo, Jim, AFL-CIO, S.D.
Buchan, Peter, Van Camp Seafoods, S.D.
DeBeer, John, Porpoise Rescue Foundation, S.D.
Edney, Steve, UCWU, Wilmington, CA
Felando, August, American Tunaboat Association, S.D.
Kerns, O. A., Bumble Bee Seafoods, S.F.
Kimmick, A. J., Neptune Packers, N.Y.
Kinniburgh, William, Del Monte Seafoods, P.R.
Lindsey, Jack, Sun Harbor Industries, S.D.
Mulligan, John, Tuna Research Foundation, T.I.
Pisano, Anthony, Fishermen's Cooperative Association, S.P.
Royal, John, ILWU, S.P.
Schultz, O. A., Del Monte Corporation, S.F.
Zolezzi, Mike, American Tunaboat Association, S.D.

NMFS

Brumsted, Robert, Washington, D.C.
Fox, William, La Jolla
Howard, Gerald V., T.I.
Smith, J. Gary, T.I.
Jensen, Peter, Washington, D.C.
Zalduondo, Herb, P.R.

OTHERS

Chapman, Douglas, Marine Mammal Commission, c/o NMFS, La Jolla
Coerr, Wimberly, Monitor, Inc., Carmel, CA

Ms. STEVENS. I would like to read just the six summary points because this is truly upbeat—since we are talking about that subject. These are the points that really seem to make a difference in saving dolphins. This has been agreed to by James Coe, Phillip Vergne, Isadore Barrett, and Frank Alverson:

(1) Set positioning to minimize negative effects of wind and current;

(2) Early recognition of potential net collapse areas and use of speedboat(s) to preven collapse;

(3) Use of speedboat(s) to herd porpoise out of potential danger areas;

(4) Use of speedboats to adjust backdown area corkline prior to backdown;

(5) Consistent use of two or three speedboats at backdown apex to prevent fish loss and to rescue porpoise; and

(6) Consistent backing down until all live porpoise are out of the net (very important).

And since we have been through so many hearings, I think you remember, Mr. Chairman, how hard the industry fought against the idea of having two speedboats to hold the net open. They argued and argued that this would frighten the dolphins and more would die than before. Now it has been conclusively proved that the two speedboats are essential. They are basic. The industry has fought every tiny little improvement just as hard as they are doing now.

So I have absolutely no use for the way they present things.

However, I think they are perfectly capable of doing this thing right. It is up to the Congress and up to the National Marine Fisheries Service to force them. They will not do it until they are forced.

Now, I do not say that is true of all captains by any means; but I do say it is true of the industry as a whole. They are determined to be monolithic. And not until you stop this monolithic position in which all the bad captains are being covered up for and the good captains—well, goodness knows why they allow it, but they do seem to. I imagine they allow it because they think the industry can just push the whole country around and force a continuation of this approximately 100,000 kill of porpoises every year. It is not necessary.

Captain Jorge said that when he heard from his brother how well that new equipment worked, he wanted to get some more right away and as soon as he used it he had immediate success. It did not take him months or years at all to learn how to save the dolphins. He just went out there and did it.

Now, as to the foreign fleets, that is something that has not been brought up nearly enough. They must be forced to comply. I do not understand why Mr. Felando is always trying to say that foreign fleets are not the "bad guys" and we do not want to say anything about them that is bad. It seems to me there is much too much talk about nobody being bad around here. If we could only get down to removing the bad ones, the good ones would be in good shape. I think.

The State Department has been very feeble, and apparently Commerce has not done anything either. So we ask you, Mr. Chairman, from these oversight hearings, to tell these agencies to get busy and require compliance by foreign fleets. It is absurd for the foreign fleets not to have to live up to the same regulations—which should be very strong—that the American fleet must live up to.

Now, I would just very quickly like to go through some of the main points which were made by the administrative law judge, which I think are very wise.

His decision on the quotas was extremely bad and was based, unfortunately, on Dr. Fox's recommendations, which do not jibe with those of other scientists.

And I would comment also—I think it was Congressman Oberstar that wondered about how many million dolphins had been killed. That does appear in the administrative law judge's decision:

Between 1959 and 1975, there were between 3,271,000—that is the lower end—or up to 3,938,000. That is for the spotted dolphin.

For the same period, the estimated total for the eastern spinner dolphin was between 1,501,000, and 1,848,000. The total mortality for the whitebelly spinner was approximately 179,000. So the total mortality including this year is between 5 million and 6 million.

The judge states:

> It is found that the use of flood lights during these types of sets will reduce mortality greatly. Therefore, as a start and at the very least it is concluded and recommended that the regulations should require that all vessels be equipped with adequate floodlights and that they be required to be used if the backdown procedures occur in darkness.
>
> It is also found that the use of rescuers on speedboats and/or rafts during sundowners lessen porpoise mortality. It is concluded and recommended that the regulations should require these procedures where the backdown occurs in darkness.

The judge, further recommended:

> * * * Mandatory use of face plates * * * and use of rubber rafts and two speed boats on all classes of vessels.

The Judge notes:

> In a random survey of some 29 cruisers since May, 1976, it was indicated that 35 to 40 percent of the mortality was caused by three vessels. Take this chilling thought. In another instance, one tuna boat accounted for 15 percent of total porpoise mortality * * * such carnage must cease.

Now, we heard about the dedicated vessel being such a very big, you know, sacrifice. However, the judge notes:

> * * * the cost of the dedicated vessel is correlated to the amount of yellowfin it catches. The greater amount caught, the less the cost, to a point where its costs of operation may be nominal.

Commenting on the NMFS proposal on suspension or revocation of skippers' certificates, the judge wrote:

> This is weak as water. There should be a more expeditious and certain procedure to deracinate those shown to be incompetent from fishing on porpoise. The spirit of the act demands nothing less.

And certainly that is absolutely right.

Then he said that:

> * * * a certificate holder who fails to comply with the provisions of the permit and applicable regulations subjects itself to revocation of the certificate and/or the right to be included under a general permit and to the penalties provided in the act.

Then there is a considerable amount of material about the fact that the biggest and newest tuna boats are the worst offenders. The smaller, older ones just do not seem to kill as many dolphins. So it is the big ones who are catching these huge numbers, Mr. Chairman, that have to have the most enforcement.

On the transfer of vessels, I am delighted to hear you say, Mr. Chairman, that they are just not going to be able to transfer—and I am sure the banks and insurance companies would like to back you up on that. According to the judge—

> There exists on about 104 seiners mortgages, liens, and other encumbrances of nearly $206 million * * * held by banks and insurance companies. Such indebtedness would place a major obstacle to transfering the vessels to foreign flags.

And he has a recommendation.

He states:

> The regulations should seek a certified list of U. S. citizens crewing foreign seiners.

In other words, that should be in the regulations so that penalties of the act can be carried out even if the captain or the crew have gone foreign.

Thank you very much.

Mr. LEGGETT. Thank you very much, Mrs. Stevens. You abstracted the administrative law judge's decision, and that is very helpful to the committee.

You have not, I understand, read the entire decision but just parts of it.

It is interesting if you divide 5 million porpoises by 17 years—allegedly that they were taken—you get 305,000 porpoises per year during that period.

I am not satisfied with the 100,000 goal. And it may well be that if the limitation stands as recommended by the administrative law judge, that it is going to be the environmentalists that are going to be back before the Committee to seek an amendment of the law to change the definition of "optimum sustainable population."

So this cuts both ways.

And we are in a situation now where we are awaiting a decision by the Executive agency on the regulations; and we are also awaiting a further decision by the courts on interim regulations. We are contemplating action by the committee as to what is required. And I think the oversight hearing has served its function. I think we have brought a large number of people together to make our record and the record of the subcommittee is being made.

So if no further questions, the meeting will stand adjourned until further call of the Chair.

[Whereupon, at 6:15 p.m., the hearing in the above-entitled matter was recessed, to reconvene subject to the call of the Chair.]

TUNA-PORPOISE REGULATIONS

TUESDAY, MARCH 2, 1977

House of Representatives,
Subcommittee on Fisheries and Wildlife
Conservation and the Environment of the
Committee on Merchant Marine and Fisheries,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:25 a.m. in room 2212 Rayburn House Office Building, Hon. Robert L. Leggett, chairman of the subcommittee, presiding.

Mr. Leggett. The meeting of the Subcommittee on Fisheries, Wildlife, Mammals and Other Living Things will please come to order.

This morning the subcommittee here will have the opportunity to explore with the administration and others, the National Marine Fisheries Services final decision on regulations to govern the incidental kill of porpoise during the 1977 tuna fishing season. As I am sure all of you know, the subcommittee just completed a 1-day hearing on this subject matter on February 17th, at which time neither the NMFS nor the Marine Mammal Commission could make any official comments on these regulations. Therefore, it was somewhat difficult for the subcommittee to fully evaluate the predicament in which the tuna industry and the porpoise find themselves. Moreover, the subcommittee had to operate cautiously in order to avoid any undue interference in that administrative process.

I believe we fairly well circumvented the obstacles with which we were presented.

However, this morning we are no longer hampered by these previous conditions. We will examine with scrutiny these new regulations and the basis on which they have been founded. Accordingly, we are going to invite Dr. White, the very distinguished Director of NOAA, to give the subcommittee a brief explanation of the important provisions in these new regulations, how they will affect the tuna fishing industry, the porpoise, and foreign tuna fishing vessels, what problems he foresees in their implementation, whether there is sufficient and reasonable information to support these regulations, and finally any other questions which arise in the course of his explanation, including any recommendations which he might have with respect to modifications or expansions of the existing law.

In as much as these regulations have proceeded through an administrative law judge hearing, arguments in various courts around the country and been the subject of this Subcommittee's consideration in the past, I would hope and expect that we can focus upon the primary areas of interest and defer discussion on the minor provisions. Following the explanation by Dr. White and questions concerning these regulations, we will then receive the testimony from environmental and industry groups who would like to express their point of view.

We might as well start right out. And perhaps at this point it might be well if I submitted a statement by my colleague, John Dnigell, a former chairman of the subcommittee.

[The statement follows:]

Statement of Hon. John D. Dingell, a Representative in Congress from State of Michigan

The purpose of today's hearings is to explore whether the Marine Mammal Protection Act is presently acting to inhibit the operation of the U. S. tuna fleet, and if so, the degree to which the Department of Commerce regulations are responsible, as opposed to the language and intent of the Act itself.

I can speak only briefly on this subject, but I think it important to underscore the fact that the Marine Mammal Protection Act, in which I was rather heavily involved at the time of its enactment, was not intended to serve as the vehicle for shutting down the entire operation of the U. S. tuna fleet, if that can be avoided. The Act was intended to provide a means whereby the interests of the marine mammals, as constituent elements of a functioning ecosystem, could be considered as well as those of the traditional fishing industry. I believed then, and believe now, that this is an important step forward.

I make no judgment yet as to the reasonableness of the Commerce Department's regulations: if they are the only way to avoid the endangering or destruction of an important marine species, they may be vital. I will be interested, and I am sure that the rest of this Subcommittee will be just as interested, in the facts of the matter. But I do feel it important to state clearly my feeling that there is little advantage to be served by so constricting the operations of the industry that they are forced to abdicate the field entirely, leaving it to the less tender mercies of nationals of other countries which may be far less concerned with the importance of protecting the marine ecosystem, and the animals within that system, than the United States.

This, I believe, is an important consideration and should be kept in mind as today's hearings progress.

Mr. Leggett. With that introduction, I would like to have Dr. White present himself at the table with whatever supporting experts he cares to select.

Alright, as I understand, you have no prepared statement so there is nothing to include in the record at this point.

If you have any exhibits that you want to include, they will be included as you desire.

STATEMENT OF DR. ROBERT M. WHITE, ADMINISTRATOR, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, ACCOMPANIED BY WILLIAM BREWER, GENERAL COUNSEL, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION: AND ROBERT M. SCHONING, DIRECTOR, NATIONAL MARINE FISHERIES SERVICE

Dr. White. Thank you, Mr. Chairman, and members of the committee.

We welcome this opportunity to talk with the members of the committee to explain the actions that we have taken in connection with the regulations for 1977.

I do not have a prepared statement and I will address some of the key questions that are embedded in the promulgation of the regulations.

Mr. LEGGETT. Let the record show you are here with Mr. Bill Brewer, your counsel, and Robert Schoning, the director of the National Marine Fisheries Service and perhaps others. I see Dr. Fox is here.

Dr. WHITE. In addition to the people at the table, there are additional people from my organization who can answer the questions that the committee may have.

First, let me say that the decisions embodied in these regulations were difficult, indeed. There are many aspects of the regulations and I will comment on several which I think are of greatest concern and, perhaps, among the most difficult.

The first deals with the general level of quotas for the taking of porpoises incidental to tuna fishing. As you know, we have proposed a total of 59,050. This number is allocated by individual species and the number allocated by species has been specified in the regulations.

Mr. LEGGETT. Let me see, are there any allocated for the spinner?

Dr. WHITE. No. I am going to get to that question.

Mr. LEGGETT. OK.

Dr. WHITE. Perhaps the most difficult question we had to address dealt with the regulation of the eastern spinner porpoise and the status of that stock.

Our regulations are based upon our finding that the eastern spinner porpoise is depleted under the terms of the act.

With this finding of depletion, it then becomes impossible under the terms of the act to allow any take of the eastern spinner porpoise. Therefore, any mixed schools of porpoise which include eastern spinners, are not available for setting in connection with tuna fishing.

We fully appreciate that this finding and the regulations that followed from this finding created serious economic hardships for the industry. But after examining the record and the arguments pro and con with regard to the question of depletion, and there are legitimate scientific differences of view as to whether the eastern spinner porpoise is depleted, we have come to the decision that we had no option but to declare the eastern spinner porpoise depleted.

Now, I have testified before this committee before, Mr. Chairman, and I have expressed my personal views that given the court interpretations of the act and the way the act is now written, that the course which we are now following is going to be disastrous for both the tuna industry and the porpoises.

I would like to just briefly quote from the recent decision of the Ninth Circuit Court of Appeals in Los Angeles on the 24th of February because it reflects very clearly, the kind of problem which all of us confronts.

In giving its decision and returning the jurisdiction to the court of appeals here in the District, the court said "This action reflects our belief that these——

Mr. LEGGETT. What is the date of that decision?

Dr. WHITE. February 24.

"This action reflects our belief that these hardships"—and they are talking about the hardships in the industry— ". . . have the origin in the terms of the Marine Mammal Protection Act which we can neither amend nor ignore."

This is similar to other views expressed in other courts. They have looked at various cases in connection with this tuna-porpoise issue.

I am fully convinced, Mr. Chairman, that there need to be some changes in the act as it is now written. I have testified to this previously before this committee. These are my views. They are being considered by the Department of Commerce and the administration. As of this point, no decision on this has been reached.

But my view is, unless we do make some changes in the act, we are going to continue to careen from crisis to crisis, which is what we have been doing for the last year and a half.

The members of this committee and I others in this room have discussed the various issues surrounding the implementation of this act, and I think the time has come when we must provide for changes in the act which will allow for the industry to continue with its very vital work, and also provide for the reduction of porpoise mortality. I believe this can be done.

Now, we can go into very great detail with regard to the various regulations that we have promulgated. I will be glad to answer any questions and my associates will help me, Mr. Chairman.

Mr. LEGGETT. Very good.

Mr. LEGGETT. I believe that this committee fully subscribes to those concepts as does the Department of Commerce. I fully believe that the targets of the Marine Mammal Protection Act reasonably can be achieved, and also that we can keep the U.S. tuna industry the most viable American fishery.

We have some misunderstandings from time to time, and we have some hurdles to circumvent from time to time. We have some differences of opinion. We have some fishermen who want no inhibitions whatsoever on their operations and, clearly, that cannot persist.

We have other folks that in their efforts to be concerned with mammals want no fishing whatsoever to occur, and obviously, that is not going to occur.

So we need our reasonable people addressing a formidable problem. We are in the posture of a crisis at the present time.

We have here regulations which we, at one time, attempted to mold from this committee. We found out that the oversight of this committee was only limited because laws that are enacted by the Congress have plain meanings, and it is only when those plain meanings are obscured that we have discretion and oversight to spell out what that meaning is.

Agency representatives in courts are all limited in what they can do in interpretations and, many times, the courts have said if this means that there is some confusion, so be it, because our job is to interpret the law as Congress gives it to us, and if they give us a bucket of sand, in words so to speak, a bucket of sand is what we administer and what we relate to.

So I believe that the targets of the Marine Mammal Act are reasonably sacrosanct, and I believe the target of a viable American fishery is what this committee is all about, to redevelop those fisheries that have not come up to the posture of the American tuna industry.

I believe we can achieve both of those standards. We have got some things that we can relate to in the meantime. I hope we can focus on the precise problems that preclude us from achieving these mutual objectives at the present time. As I understand it, the courts are working on this matter.

Griffin Bell has addressed himself to the court, and has asked for some interim relief. And if that is possible, and if that relief is practical, so be it. But we do have a responsibility at the legislative side, and we intend to discharge our responsibilities also, although obviously, in this area, we don't want to overlegislate.

I don't want to put my colleagues in the position of either being profisherman or proenvironmentalist because I don't think we need to choose, because I think we can achieve the best of both worlds. That is my word.

So let us take the regulations as promulgated, and I have not read them specifically. But as I understand, your regulations envision for the 1977 fishing season, as and when the regulations become, in fact, operative, which as I understand now is the end of April at best, which is one problem I want to address. To what extent do you envision a 100-percent observer program on boats over 400 tons?

Dr. WHITE. Our present plans, Mr. Chairman, for the implementation of the 1977 regulations, envision 43 percent of the trips having observers on them. That is, 130 vessels for the remainder of the year after the regulations are in effect and permits granted. This is a step up from last year. We are stepping up from 10 to 15 percent of all trips, to about 43 percent of all trips.

Mr. LEGGETT. That is to the extent that you have observers trained and available, or money to pay for them?

Dr. WHITE. That is correct.

The present authorization under the Marine Mammal Protection Act limits us. The President has gone to the Congress with a request for a supplemental appropriation for fiscal year 1977 for an additional 1.1 million dollars to enable us to put these additional observers on this year.

Mr. LEGGETT. How much money do you have at the present time?

Dr. WHITE. About $3.445 million.

Mr. LEGGETT. So you have then $1.43 million available for observers for the balance of the current fishing season in 1977?

Dr. WHITE. Only if the committee increases the authorization we get the supplemental.

Mr. LEGGETT. You need a new law by this committee?

Dr. WHITE. We need the authorization increased. In fact, the authorization expires this year.

Mr. LEGGETT. Have you presented a draft copy of the bill to this committee?

Mr. BREWER. It is part of our legislative program. You may not have it yet.

Mr. LEGGETT. All right. Let us get that bill up here, because this committee, I think, fully supports an observer program to the maximum extent feasible.

That would envision how many observers?

Dr. WHITE. It would be 130 trips.

Mr. Leggett. That might be 130 observers, or something less than that?

Dr. White. Some observers would make more than one trip, Mr. Chairman.

Mr. Leggett. Does that account for 43 percent of the vessel fishing time, or just 43 percent——

Dr. White. It is 43 percent of the anticipated trips.

Mr. Leggett. Forty-three percent of the trips will have—that is of all boats over 400 tons, they will have observers?

Dr. White. That is correct.

Mr. Leggett. So it would be less than 43 percent of the overall trips?

Dr. White. That is correct, Mr. Chairman.

Mr. Leggett. You set a target limit as far as—if my colleagues indulge me, I will dominate this for a minute to get this going. If you want to interrupt me, just do it.

Mr. Leggett. As far as the numbers of porpoise to be taken, you originally recommended some 40,000 of which 29,000 would be the domestic share.

We heard considerable testimony on this. The administrative law judge recognized that, in fact, we had not taken 72,000 or 78,000 last year, but in fact had taken something over 80 or 90,000, and, as a result, he recommended that there be a 90,000 something limitation, 96,100. And your recommendation is, 59,050, which would be an improvement over the 72,000 which you recommended in your target last year, which was not achieved.

Dr. White. 78,000.

Mr. Leggett. I assume that your recommendations in this respect are based upon anticipation of acquisition of nets and gear and training and performance as near as possible, in as many cases as possible, approaching the *Elizabeth C. J.* Scientific Cruise experience?

Dr. White. We believe that with the technology the industry has and can put to sea in the upcoming year, they should be able to reduce the porpoise mortality to this level.

Mr. Leggett. All right, that is assuming, of course, that to date the American fleet has taken none, correct?

Dr. White. We have to assume the American fleet has taken none.

Mr. Leggett. Have you received any reports that they have taken any?

Dr. White. No.

Mr. Leggett. So they get the presumption of innocence in that respect. OK.

So that is the numbers situation and, very frankly, from what I hear around, the numbers are liveable. Can you train this number of observers in the time frame you have available if the Congress acts?

Dr. White. We anticipate it will be possible to put that many observers on.

Mr. Leggett. Your regulations, we have been told, with the various checks and balances on them, unless there is a court order modifying them, will not be effective until some time during the end of April.

Will you address that and give us the variables?

Dr. WHITE. Well, the regulations are operative now. We are waiting for the applications from the industry, and we expect, probably sometime around the middle of April, the vessels will be able to go to sea.

Mr. BREWER. May I comment further on that, Mr. Chairman?

Mr. LEGGETT. Mr. Brewer.

Mr. BREWER. Not only do we have the waiting period that Dr. White referred to, but we also have the order of the Court of Appeals of the District of Columbia which requires applications be submitted with supporting material.

The presumption is that the court wants to review each of these applications on its merits, and exercise a veto power if it wants to do so.

Mr. LEGGETT. How many will it be?

Mr. BREWER. The American Tunaboat Association applied for a permit. But the individual vessels must also ask for certificates of inclusion, so there will be perhaps 130 of those for the various vessels.

Mr. LEGGETT. What is there to look at? They apply for taking 59,000 incidental take, and they list 130 vessels which are documented in the Department of Commerce, so what is the issue there?

Mr. BREWER. I imagine the court wants to be sure that we are complying with the law, but except for the bare words of the order, we have no advice on what it is looking for.

Mr. LEGGETT. Is there any discretion visited by law, as far as you know, with the court in this regard?

Mr. BREWER. None whatsoever, Mr. Chairman, but of course the court has the power to order us to do that.

Mr. LEGGETT. Well, Mr. Brewer, they can order you to do anything.

Now, if the court did not request that this one application with 130 boats' names attached be submitted to it, how much time would it take to implement and make operative your regulations?

Mr. BREWER. Well, in the absence of any action by the court which may delay the issuance of the permit and the certificate of inclusion, the principal time limitation is the 30 day statutory comment period. We must publish the application for a permit and 30 days must elapse for public coment. Thereafter we may proceed with issuance of the permit and certificates of inclusion. If the Chairman would like——

Mr. LEGGETT. Now, you have had a comment period on the regulations?

Mr. BREWER. Yes.

Mr. LEGGETT. God. Have you had a comment period! You have been going through hearings for 2 months or more.

Mr. BREWER. There is a further limitation in the statute.

Mr. LEGGETT. Why?

Mr. BREWER. Because the statute tells us what we have to do.

Mr. LEGGETT. Why?

Mr. BREWER. So the public can comment on the request of an applicant to conduct a fishery and his general character. There are grounds set forth in the statute for that comment period.

Mr. LEGGETT. Have you ever had any comments?

Mr. SCHONING. Yes.

Mr. LEGGETT. What kind of comments do you get?

Mr. JENSEN. The comments, in general, have been along the line of issuing or not issuing a permit in the numbers that have been requested.

Mr. LEGGETT. Does it reargue the regulations again?

Mr. JENSEN. In some cases, yes.

Mr. LEGGETT. But that is senseless. Does that make good sense to you?

Mr. JENSEN. If we are administering nonsense, we ought to admit what has merit and what is the nonsense.

So, here we have a bare request with a bare bones number of boats going to a judge who, apparently, has no discretion in the matter, but can order a review and we have got a comment period on something that has had so many comments that it has created volumes of material that this committee has not even been able to work on or look at.

I presume the President means what he says and says what he means when he says to the maximum extent of feasible we ought to cut down on the paperwork in this administration.

So is there anybody in this room here that would have any comments to make on an application under this law during the 30 day period?

Let the record show that there is silence.

Mr. FORSYTHE. Mr. Chairman?

Mr. LEGGETT. Yes.

Mr. FORSYTHE. Going back to the comment period this applies to all marine mammal permits for scientific and public display. In these cases there is a very reasonable reason for comment as to whether it is actually scientific taking and I think maybe we should be a little careful of eliminating the comment period.

Mr. LEGGETT. Does the 59,000 also include scientific taking?

Dr. WHITE. This is only the incidental taking.

Mr. LEGGETT. The scientific taking was substantial because they took nine out of the *Elizabeth C.J.* run, you recall.

Mr. FORSYTHE. Yes, I think you have to cut this so you do not invade that area of comment.

Mr. LEGGETT. I am not talking about amending anything, I am just talking about where we generally are.

Mr. DE LA GARZA. May I ask a question in this respect?

Mr. LEGGETT. Yes.

Mr. DE LA GARZA. In the regulations, I cannot tell the page here but it is capital B and then two small i's.

Mr. LEGGETT. What page are you reading in the regulations?

Dr. WHITE. In the top right there is a number.

Mr. DE LA GARZA. That is where it is clipped, on the regulation, on the third page, capital B and then toward the bottom of the page, it quotes section 216.3.

> A certificate holder may take such steps as are necessary to protect his catch, gear or person from depredation, damage or threat of personal injury; however, all marine mammals taken in the course of a marine fishing operation shall be subject to the provisions of section 216.3.

With respect to the incidental catch, it may not be retained unless a specific permit has been obtained authorizing the retention.

Dr. White, does that in any way involve operations like Sea World. where they have the trained porpoises for people to visit?

Dr. White. There is a totally separate system for display permits which are submitted by groups like Sea World, and criteria have been set up in accordance with which such permits for display are granted.

Mr. de la Garza. I do not have access to 216.3. I do not know how that reads. Is that the section that allows for a special permit for those?

Dr. White. It is the definition of take incidental to commercial fishing.

Mr. de la Garza. Thank you.

Mr. Leggett. OK.

Mr. de la Garza. Mr. Chairman, I have one more, if I might, because unless you have a permit for the retention, like if they—you are talking of maybe only one, but if there is an injured mammal and like, periodically, you have an injured deer or bear or something, that there is a possibility that you could retain it. I do not know if it could board a tuna boat or not, but if that were done, then they would be in violation unless they have a permit on hand always to do that?

Dr. White. Yes.

Mr. Leggett. All right.

We have got some questions here that staff has prepared.

We would like to explore the steps leading to the production of the final regulations which are the subject of this hearing.

A, is it true that one of the important documents used in the development of regulations was the Report of the Workshop on the Stock Assessment of Porpoises involved in the eastern pacific yellowfin tuna industry issued at La Jolla, Calif., in Septmber, 1976?

Dr. White. Yes.

Mr. Leggett. That is one of the things that was used?

Dr. White. Yes.

Mr. Leggett. It is my understanding that this optimum sustainable population workshop report did not make a finding that any porpoise involved in the fishery was biologically depleted. Is that correct?

Dr. White. The depletion definition in the law is not one of biological depletion. It is a definition of depletion which relates to the optimum sustainable population and when the stock falls below optimum sustainable population, then, in terms of the law we are obligated to call it depleted.

In the case of the porpoises, they are not biologically depleted.

Mr. Anderson. What would be the difference?

Dr. White. There is no definition of the word "depletion" other than that which is in the act which refers to optimum sustainable population.

When we are talking about biological depletion, we are talking about a stock that has been reduced to such a very, very low level that it is either threatened or endangered with extinction. That is not the case in the stocks of the porpoises.

Mr. LEGGETT. Counsel?

Mr. SPENSLEY. Dr. White, does that mean that your interpretation and decision about depletion is based upon the third criteria in the definition of depletion under the act?

Dr. WHITE. That is correct.

Mr. LEGGETT. What is the third criteria?

Dr. WHITE. When a stock falls below its optimum carrying capacity it is depleted.

Mr. LEGGETT. So we know, the optimum sustainable population of spinners is what?

Dr. WHITE. What we know are two things about the spinners. We have an estimate of the population of spinners which is about 54 percent of its original stock.

Mr. LEGGETT. How many numbers is that?

Dr. WHITE. It is 1.3 million, Mr. Chairman.

Mr. LEGGETT. 1.3 million.

Now, as I understand it, that was your median estimate?

Dr. WHITE. Yes, in terms of the level of the population.

Mr. LEGGETT. So that there would be a ban then, is that true? Would the median be right in the middle?

Dr. WHITE. There are two factors that must be considered to determine whether the stock is depleted.

One, what is the level of the population? And the second is, what is the optimum sustainable population? If that level is below the optimum sustainable population, we get into the scientific controversy as to what is the lower limit of optimum sustainable population.

The optimum sustainable population study group that met in La Jolla pointed out that that lower level is somewhere between 50 and 70 percent of the original stock level.

Some of the scientists believed it was higher than 50 percent and others believed it was around 50 percent.

Mr. ANDERSON. 50 percent of what?

Dr. WHITE. Of the original stock level.

Mr. ANDERSON. What is the original stock level?

Dr. WHITE. 2.4 million.

Mr. ANDERSON. That is the figure that you estimate that there are in existence today?

Dr. WHITE. Originally, before there was any incidental take of porpoise, it was estimated to be 2.4 million. Now it is 1.3 million.

Mr. DE LA GARZA. Will the gentleman yield?

Mr. ANDERSON. Yes.

Mr. DE LA GARZA. What degree of accuracy does this figure satisfy?

Dr. WHITE. There is a degree of certainty.

Dr. FOX. 1.3 million plus or minus two standard errors would be from 800,000 to 1.8 million.

The midpoint of the back calculated original stock size was about 2.4 million and I believe the range is from 2 to 2.7 million. This is under a set of assumptions in the methodology in making these estimates.

Mr. DE LA GARZA. A degree of accuracy or inaccuracy of how many?

Dr. Fox. In the current level of population or from the initial level of population?

Mr. de la Garza. Either one? Do you estimate that to what percentage of accuracy? Within 10 percent or 25 percent?

Dr. Fox. With the two standard errors that would be 95 percent confidence limits that the current stock size is approximately plus or minus 40 percent of the stock size.

Mr. de la Garza. You allow a margin of error of 40 percent?

Dr. Fox. That is the statistical margin of error in the estimate.

Dr. White. There is a 95 percent chance that the true value of the stock levels will fall between those limits. If you are willing to be satisfied with a lower level of chance, you could select one standard error and, hence, there would be a 67 percent chance of its falling between narrower limits. Statisticians usually use the 95 percent confidence limit.

Mr. Anderson. Is that what you have used, 95 percent?

Dr. White. We have used these estimates, yes.

Mr. Leggett. What you have said is that the maximum population of the eastern spinner has been estimated from 2.2 to 2.7 million?

Dr. Fox. Yes.

Mr. Leggett. Congressional counsel says original. Is there a difference between original and maximum?

Dr. Fox. We assume the stock size prior to exploitation is the original.

Mr. Leggett. 2.2 to 2.7 million eastern spinners located in the world?

Dr. Fox. No, sir, in the eastern tropical Pacific Ocean. That would be eastern spinners because eastern spinners is a stock of spinner dolphin found there.

Mr. Leggett. Is that in the CYRA area?

Dr. Fox. Some are found slightly outside.

Mr. Leggett. How far outside the CYRA area did your study entail, Dr. Fox?

Dr. Fox. Well, the information comes from areas as far west as approximately 150 degrees west longitude, a little before you get to Hawaii.

Mr. Leggett. And 150 degrees west longitude is what? It goes as far as Honolulu or farther?

Dr. Fox. It is getting within a few degrees of Hawaii on a vertical plane.

Mr. Leggett. That is north and south?

Dr. Fox. Yes.

Mr. Leggett. Dr. Fox, how do you effect that estimate?

Dr. Fox. We estimated current stock levels, and then by the use of a model of the response of the population to exploitation, by the use of the current net reproductive rate, and by the estimates of fishing mortality for previous years, we are able to start with the current population size and back calculate what the original stock size was.

Mr. Leggett. All right.

So you had no original information as to what the stock was in the area?

Dr. Fox. No direct original information.

Mr. Leggett. How did you gain your information with respect to the current sizes of the stock?

Dr. Fox. On the basis of aerial and ship surveys, primarily. Mainly aerial survey to get the density of the porpoises.

Mr. Leggett. What did your survey consist of?

Dr. Fox. Flying a Grumman Goose approximately 11.000 track miles out 500 or 600 miles from the southern tip of Baja, Calif., down to the Central America bight. And there was information which was utilized from tuna and research vessels which have plied throughout this whole area.

Mr. Leggett. That was on one flight?

Dr. Fox. It was a series of flights conducted in 1974. We currently have a much more extensive aerial survey under way right now.

Mr. Leggett. Is your current survey verifying the original statistics you collected?

Dr. Fox. We are still collecting the data and have not had a chance to analyze it.

Mr. Leggett. You do not plug it in on daily basis?

Dr. Fox. No, we cannot do it. The current estimate of the eastern spinner population is somewhere between 800,000 to 1.8 million.

That would be a 95-percent confidence interval.

Mr. Leggett. Also 125-percent error.

Dr. Fox. Top to bottom?

Mr. Leggett. Right.

Dr. Fox. There is quite a bit of statistical imprecision in the estimate, is that correct.

Mr. Leggett. What is the error associated with this 125-percent range that you have between the 800,000 and 1.8 million?

Dr. Fox. I do not believe I understand the question.

Mr. Leggett. You indicate there is somewhere between 800,000 and 1.8 million?

Dr. Fox. That is correct.

Mr. Leggett. To what extent can those figures be wrong?

Dr. Fox. Based upon the assumptions, assuming a normal distribution, and assuming the variances on the whole set of assumptions, there is a 5-percent chance that the population lies outside of those bounds.

Mr. Leggett. So based on this, then, is it not true, or is it true, that the report did not make a finding that fishing in association with any species or stock of porpoise associated with tuna should be stopped?

I am referring to the workshop on stock assessments.

Dr. White. I do not recall that particular language. Does that come directly from the report?

Mr. Leggett. I guess the implication from the report is, that if the report says that no stock was biologically depleted, then the implication would be that no stock should not be incidentally taken.

Now what you state is that biological depletion is not the test?

Dr. White. That is right.

Mr. Leggett. Therefore, the workshop drew conclusions which were either beside the point or on an erroneous premise?

Dr. WHITE. They addressed the question of what is the optimum sustainable population. They came to the conclusion the lowest was 50 to 60 percent. If we had any stock which was below 50 percent of the original level, which we did not, everybody would agree that it was depleted by the terms of the act.

Now we have a stock that is 54 percent of its original level. That falls somewhere between the estimates of 50 to 70 percent of the lower limit of the optimum sustainable population. The question therefore arises as to how you make the judgment as to whether that stock is or is not depleted.

There are scientists that will take the view that it is not depleted. There are others who will take the view that it is depleted.

In our judgment, as to whether it was depleted or not, we were persuaded by three rather cogent factors. One was the view of the Marine Mammal Commission, which was established by statute to provide oversight on these matters. And we have a letter from them which indicates that they believe the stock of Eastern Spinner porpoises is depleted.

Further, our own statistical analysis indicates that there is about a 60-percent chance that the eastern spinner porpoise is depleted. We were then faced with the question of whether a 60-percent chance of its being depleted warranted our declaration of eastern spinner as being depleted.

We came down on the side of saying it is. It was a close call, but we did not see any alternative after also considering the views of the Marine Mammal Commission, but to come down on the side of its being depleted in terms of the act.

To get to the question of the biological depletion, everybody agrees that you could take as many as 6,600 per year of the eastern spinner porpoise population and still have the virtual certainty that the stock of that porpoise would continue to increase. That is a separate statement, however.

Mr. LEGGETT. You could take that number and have a virtual certainty that a depleted species is increasing?

Dr. WHITE. That this species is increasing.

Mr. LEGGETT. OK, Dr. White.

Dr. WHITE. But we were faced by the requirements of the law that say once a species is declared depleted, we cannot allow any take of that particular species. That is the dilemma we are in. We know, from a biological point of view, that you can allow a take and still have that population increase. On the other hand we are constrained by the law and the interpretation of the courts that we cannot allow that take. It is a dilemma.

We fully appreciate the economic hardship it is causing to industry. That is why I said we must look at some changes in the act that would permit us to reduce the porpoise mortality which, I believe, we can do and still allow the industry to fish.

Mr. FORSYTHE. Mr. Chairman?

Mr. LEGGETT. Mr. Forsythe.

Mr. FORSYTHE. Dr. White, there is also doubt whether we can define the optimum sustainable population for particular species if you take the whole ecosystem approach.

Dr. White. You will have greater authorities testifying on that than myself, particularly Dr. Chapman, who is one of the leading authorities. It is a difficult problem and difficult to define. The scientists we assembled for this special optimum sustainable population workshop had difficulty, referenced by the fact they could only come up with a range for the lower limit of optimum sustainable population.

Mr. Forsythe. You have a whole lot of figures that are estimates, which is all we have to operate with. You have come up with this 6,600 take which will still allow the stock to increase.

Dr. White. In a sense, we are prisoners of carrying out the provisions of the act as written. And we really do not have a choice, as the courts have told us, in interpretating it otherwise.

Mr. Forsythe. Thank you, Mr. Chairman.

Mr. de la Garza. Mr. Chairman, may I ask a question while there is a lull?

Mr. Leggett. There is no lull, but go ahead. I was thinking. I just was not making any noise.

Mr. de la Garza. I, among the others, have introduced legislation that proposed regulations be sent to the committee of jurisdiction before being published by the different agencies in the departments of the government.

Do you care to comment on that?

Dr. White. I would like to reserve my comments. We welcome the views of the members at all times on things we are doing, and we can informally discuss where it is legally permissible to do so, concepts that we are thinking about in terms of regulations; but to formalize the regulations actually coming to the Congres for approval, I want to think about that.

Perhaps my counsel has a comment.

Mr. Brewer. I am familiar with the measure, Mr. de la Garza, but there are some constitutional questions if that meant a veto power in a committee of Congress and in a single house. I am sure you are familiar with questions which have arisen in other legislation on this point.

I would be glad to look at the bill and give you some further comment if you would like me to do so.

Mr. de la Garza. I would just like to get your opinion as to giving the Congress an opportunity for input before, and not after, the fact, without not necessarily wanting to have a veto or infringing on the congressional or constiutional prerogatives.

Dr. White. It seems to me where we have a hearing and the regulation is made based on what is in the record, there is an opportunity for any individual to make their views and comments known in the course of those procedures.

Mr. de la Garza. That is too late. I might as well, if we have time, Mr. Chairman, say this. John Q. Public, in my congressional district—they do not know about the Federal Register; 90 percent of them do not know what the Federal Register is. The 1 percent who know don't get it. So input from the people sounds good when you say, 30 days, 60 days, hearings in Utah, hearings in California, hearings here and there. But only those professional people closely related to the problem know anything about that. The average citizen doesn't have the input or the time or the necessary funds to go, so after the regulation is promulgated, published, and many times in effect, then they come to yours truly complaining. And then there is nothing we can do except to come back and change the law. But I have access to my area every other weekend throughout the year on everything. And, therefore, as a conduit for input from them, my time to do so would be before you publish and get into all the formalities, not necessarily personally wanting to veto or to get involved, but to better represent the people that are not involved and do not have the opportunity when you go through the process of the Federal Register.

Dr. WHITE. I agree that there is a certain obscurity to the Federal Register, but we do send copies of our proposed regulations around. We would be delighted to keep your office very closely informed on those things so we can make sure that your constituents and you are aware of the kinds of things we are proposing.

Mr. DE LA GARZA. Before you get them in the record, you don't do that.

Sometimes they say, tomorrow you will publish in the record, and you call at 8 in the evening. That does not help too much. Not you, necessarily.

But if we can strike a little compromise here with that legislation on a—I guess with the committee, I certainly would appreciate any advance information you can make available to me on proposed regulations for proposed dissemination in an unofficial capacity before you go public, if your rules and regulations would permit you to do that.

Dr. WHITE. We would be delighted to sit down with you and see what it is we can do to improve our communication with you.

Mr. DE LA GARZA. I would appreciate that.

Mr. LEGGETT. Now, to get back a bit, assuming that there are 1.292 million eastern spinners as the current stock size with the others that we mentioned, the living marine resources group projects that this size group would produce a birth level of 167,000, a mortality natural level of 116,000, giving a net rise of stocks of 51,000, less a requested or recommended take by various agencies of 6,000, which would give a total stock projected increase of 44,000. Is it your testimony that in spite of this, assuming these are the facts we work with, considering the fact that they are in what we define as a depleted posture, you are unable to allow the projected take that was included in one form of your regulations earlier, Dr. White?

Dr. WHITE. Well, I am not quite sure that I know what you are referring to. Our decision was made on the material in the record and the proposals in the record.

Mr. LEGGETT. Do you agree with any of the statistics that I have just talked about?

Dr. WHITE. I would have to look at them. I just cannot assimilate them that quickly. We would be delighted to look at them.

I have made available a chart which might be convenient to the committee to look at which has the proposals of the various groups in these hearings. It is a long chart.

Mr. LEGGETT. I looked at that. It showed a number of agencies had, in fact, recommended the 6,000 take.

Dr. WHITE. That is correct.

Mr. LEGGETT. Including the Marine Mammal Commission.

Dr. WHITE. That is correct.

Mr. LEGGETT. It recommended 6,000 for the eastern spinner.

Dr. WHITE. That is correct.

Mr. LEGGETT. As an incidental and accidental taking.

Dr. WHITE. There is a big difference.

Mr. LEGGETT. I presume that. I presume what they mean was you you can set on mixed schools and if you accidentally take 6,000, that would be a limit?

Dr. WHITE. No; they, of course, will be testifying later this morning or this afternoon, but my interpretation of what they meant by that is that they did not consider it proper to set on mixed schools, but that if you did set on a school which notwithstanding all the good intentions of the fishermen by accident had some eastern spinners in it the Commission would be willing to see a number of eastern spinners taken, up to 6,500 as we discussed this morning.

Mr. LEGGETT. I meant to say the same thing except that I said it a little differently.

Mr. McCloskey is here and he has some questions. You are recognized.

Mr. McCLOSKEY. Thank you.

I have to go back to the cargo preference hearing.

I note there is a bill, S. 373, introduced on January 19 by Senator Hyakawa. Did your office provide any help to him in preparing this bill?

Dr. WHITE. Yes.

Mr. McCLOSKEY. Dr. White, in 1976, what proportion of 400 tons or over boats going out had observers?

Dr. WHITE. Fifteen percent.

Mr. McCLOSKEY. What was the porpoise kill on observed boats compared to the porpoise kill reported by boats that did not have observers? What was the ratio?

Dr. WHITE. Could I address this question to Dr. Fox?

Mr. McCLOSKEY. Surely.

Dr. FOX. I think this question came up the last time. I do not recall the exact number for 1976, but the point is the reported kill on vessels without observers who turned in marine mammal log sheets was, on the average, significantly less than the average kill reported on vessels that had observers on board.

Mr. McCLOSKEY. Was it as small as one-sixth of the reported kill on the boats that had observers?

Dr. FOX. I believe that was the figure for the early part.

Mr. McCLOSKEY. So we have 140 boats of 400 tons or more, 10 percent to 15 percent of them have observers and the observed boats report six times as many kills as the boats that do not have observers on board.

Now, it does not sound reasonable to me that a skipper with a Department of Commerce observer on board is going to kill six times as many porpoises as a skipper that does not have an observer. Does that seem reasonable to you, sir?

Dr. White. It is a difference that needs explanation.

Mr. McCloskey. It is a difference that needs explanation. That is about as diplomatic an answer as you can give. I have done some fishing and fishermen are notorious liars.

What I would like to know is how the Department of Commerce develops statistics for porpoise kill? Do you use a multiple of six times the report of your observers?

Dr. White. Only the observer data is used.

Mr. McCloskey. Then, if the same number of kills occurred on unobserved boats, there are six times as many porpoise kill.

Dr. White. No, no. Our assumption is based on the sampling from our observers, so we do not use the estimates of nonobserver vessels.

Mr. McCloskey. Then your statistics are based on the assumption that your nonobserved skippers are underreporting by 5/6?

Dr. White. They are different, yes.

Mr. McCloskey. The only way we will know the exact porpoise kill is to have an observer on each boat.

Dr. White. The only 100 percent, fool-proof method of making sure is by having an observer on every boat.

Mr. McCloskey. If we are going to put an observer on every boat, why does Senator Hyakawa—why should the U.S. Government have to bear this expense? Why should'nt the consumers of tuna bear the cost of protecting porpoise?

Dr. White. If I recall the language, it is permissive and does allow us to charge the industry the cost.

Mr. McCloskey. But in your proposed regulations, you do not require the industry to bear the cost?

Dr. White. Under the present regulations, we do not.

Mr. McCloskey. Why not? We are properly criticized in the Congress for giving you an immense responsibility but without appropriating the money to carry it out. If you are going to protect the porpoise the fishermen, as part of the cost of doing business, ought to pay every cost and one to keep him honest, is an observer on every boat if I understand your testimony right.

Dr. White. The reasons why that language was in S. 373 is that we do not presently have authority to do what you suggest.

Mr. McCloskey. Do you see any problem in us mending the statute to require as a condition of any permit that the cost of the observer be born by the industry?

Dr. White. I think that this is a question that would have to be looked into very carefully. That is why we drafted it in the Hayakawa bill as permissive language. There are some things that are the responsibility of the taxpayer.

Mr. McCloskey. You know the appropriation here. I do not think, with the Carter budget, that there is any prayer that we can authorize the cost of an observer on every boat.

Dr. White. Well, President Carter has approved a 1977 fiscal year supplemental budget request of $1.1 million to increase the number of observers to 43 percent coverages.

Mr. McCloskey. But you say it will not protect the other 60 percent?

Dr. White. No, it is not as good as 100 percent, but it is certainly a great deal better than 10 percent.

Mr. McCloskey. Considering the total number of cans of tuna packaged in the United States, how would it effect the cost if we had an observer on every boat?

Dr. White. I do not have that number.

Mr. Leggett. We will stipulate it is practically nothing.

Mr. McCloskey. Why should the United States taxpayer bear the cost of protecting the porpoise? In this bill, you agree on the near zero goal. I was surprised at that.

I thought the Department of Commerce might believe that near zero mortality and serious injury was not possible. But you have accepted that precept in the bill Senator Hayakawa has proposed.

Why should the Government bear one dime of the cost of a near zero mortality goal?

Dr. White. I come back to the point that I think there is a national interest involving the industry and individual consumer. If we are definitely concerned about reducing porpoise mortality and this is a national position in Federal law, and if the people of the United States feel we ought to do this, then there is some national responsibility.

Mr. McCloskey. It has been the purpose of the United States as declared by an Act of Congress since 1972 and in your amendment offered in 1977, you accept a near zero mortality.

Dr. White. That is correct.

Mr. McCloskey. If that is the national purpose, why should it be borne by the Government of the United States?

Dr. White. I can give you the only reason I have given. There are values involving porpoise populations that go beyond the responsibilities of individuals who either catch the tuna or eat it.

Mr. McCloskey. I quite agree. My question is, why should the Government of the United States bear the cost of an observer on a tuna boat? Why should not that be borne by the industry, and ultimately, passed on to the consumer of the tuna?

Mr. Leggett. There is another question. Whose employee is the observer? If he is an employee of the Federal Government, then we have not got only the cost of the wages, but we also have Federal employers liability and miscellaneous other kinds of Federal benefits.

Mr. McCloskey. Fishermen without observers are reporting 1/6 of the porpoise kill that is reported by boat observers. If NOAA's testimony is based on the fact that 5/6 of all tuna fishermen are liars excepting those with an observer on board, they are imposing a certain obligation on government to keep them honest. Is that correct Dr. White?

Dr. White. I am really not going to comment on whether the fishing captains are liars.

Mr. McCloskey. You are basing your official statistics on the basis that they are not telling the truth when they report the porpoise kill?

Dr. White. I am basing it on the best scientific information I can get and they are individuals trained by us who observe.

Mr. McCloskey. The best scientific evidence you can get is that you are not going to get the truth from a tuna skippers. Is not that an unalterable conclusion for you, even as a diplomatic witness?

Dr. White. We would not be satisfied with the scientific evidence collected by others than the observers we have trained.

Mr. McCloskey. Well, let me ask this. Could I ask unanimous consent that the record be extended for 10 days for inclusion of this fact? What will be the cost of a can of tuna on today's market if as part of a license application an observer is placed on every domestic fishing boat at the expense of the industry?

When they apply for a license, they would agree to accept an observer and bear the cost. What would be the total cost of an observer program and how would it be reflected in the overhead of the company during business?

Dr. White. We would be delighted to supply the information.

[The following was received:]

ESTIMATED EFFECT OF A FLEET-FUNDED 100% OBSERVER PROGRAM ON RETAIL CANNED TUNA PRICES

In order to estimate the effect a substantial cost increase on a raw product will have on the finished product, one must make some broad assumptions which can greatly change the effect. Therefore, the following assumptions are made in this analysis:

1. Observer program costs incurred by Certificate Holders would be transferred directly up the chain from the catching vessel to the consumer.
2. No change in imported/domestic tuna supply usage by processors.
3. 1977 tuna catch will maintain its present 5 year average level.
4. U.S. purse seine effort on tuna associated with porpoise will not change in 1977.

Given these assumptions, we are able to make the following calculations:

1. The 5 year average tuna landings (1970–74) for light meat tuna species total *460,253 thousand pounds.*[1]
2. The present 1977 exvessel price for light meat tuna is approximately $650 ($655 for YF) per ton or *$0.32½ per pound.*
3. The total estimated cost for a 100% observer program is $5 million or *$0.01 per pound* based on the 5 year average landings. ($5 million ÷ #1.).
4. Thus the 1977 estimated exvessel price per pound for raw light meat tuna would be #2 + #3 or *$0.33½ per pound.*
5. This represents a percent increase in exvessel price per pound of light meat tuna (#3 ÷ #2) of *3.1%.*
6. An unpublished study indicates that a 1% rise in the exvessel price results in a les than 1% increase in the retail price. Given the estimated percent increase in raw tuna price, then the responding percent increased in retail price can be estimated by a factor indicated in the study. Thus, a 3.1% increase in exvessel price will cause an estimated *2%* increase in retail price.
7. The 1976 average retail price of chunk light meat tuna was *$1.56 per pound.*[2]
8. This would mean that a $5 million cost increase to the fleet could cause a 2% rise in the retail canned light meat tuna price or *$0.03 per pound.* (#6 x #7).

Mr. McCloskey. I have read in the papers that some skippers have gone under foreign flags in order to escape United States regulations.

Even if that occurs, are not the tuna canneries located primarily in the United States?

Dr. White. They are here and in other jurisdictions.

Mr. McCloskey. Would it not be simple to amend the Marine Mammal Act so that no cannery accepts any tuna caught by a boat without an observer on board?

---

[1] DOC, *Fisheries of the United States, 1975*; March 1976, p. 12 & 55.

[2] NOAA, *Current Economic Analysis F–25, Foodfish Market Review and Outlook*; December 1976, p. 37.

Dr. WHITE. I suppose it would be possible to do that.

Mr. MCCLOSKEY. That would also protect against foreign flag fishermen who would then have no canneries available at least at the present time?

Mr. BREWER. There is a foreign market for tuna, so we have made efforts to keep the American industry viable. That is an underlying thing. It would be hard to know the effect if we drove them to a foreign flag.

Mr. MCCLOSKEY. At the present time over half the market for tuna is in the United States?

Dr. WHITE. It is very large, yes.

Mr. MCCLOSKEY. I suppose we might ultimately have to cope with a situation where an observer program is so onerous it drove all tuna to the foreign markets. We do not face that at the present time.

Has a decision been reached whether Commerce or Interior will have jurisdiction over ocean mining?

Dr. WHITE. It is still in the balance.

Mr. MCCLOSKEY. My own vote might depend on how this law is enforced. Mr. Dingall said if we gave Commerce the responsibility it would be like putting a fox in charge of the chicken coop, but that is something else.

I want to compliment you for accepting the goal of near zero mortality. That is a significant achievement. Thank you.

Mr. LEGGETT. Thank you, Mr. McCloskey.

I want to get back to the eastern spinner.

Now, apparently, according to your final regulations, you have looked at both the eastern spinner and the white bellied spinner on the basis of 95 percent accuracy, based on that, you have determined that the eastern spinner is depleted, and, therefore, no taking should be allowed in spite of the fact that the Environmental Defense Fund recommended the numbers as you indicated, the Tuna Boat Association recommended 6,500, and the administrative law judge, 6,500.

Now, the white bellied spinner, you recommended with respect to those last October that in spite of the fact that their population was in a range between 379,000 as the 95 percent accurate number, 460,000 as the reasonably accurate number and 549,000 as the medium number, you recommended a taking of zero, the Environmental Defense Fund recommended 8,500, the Marine Mammal Commission recommended 7,800, and the Tuna Boat Association recommended 17,000. The law judge recommended 17,000.

You recommended 7,840. So the question is, is that inconsistent with your action on the eastern spinner, Dr. White?

Dr. WHITE. Mr. Chairman, we considered separately the circumstances surrounding each species.

In the case of the white bellied spinner, because we found it in a decreased mode, originally our proposals were for a zero allowable kill in order to be virtually certain that we could reverse that and have it increase.

Now, we find that the projected foreign kill for the white bellied spinners was more. It was 5,341 animals more than the kill that would be allowable if you wanted to be virtually certain of reversing that downward trend of the white bellied spinner. That is why it was proposed to be zero initially.

We were convinced by the arguments made by the various groups that you see there that the proposal indeed, was a somewhat harsh one. Therefore, because of the general level of the white bellied porpoise, which is very high in spite of the fact that it is decreasing, we feel that, after listening to the testimony on the record, that we could go to the median—7,800 to 8,500—which was recommended by the Marine Mammal Commission and the Environmental Defense Fund. This was after looking at the counts in the record.

Mr. LEGGETT. But 7,700 is 1½ percent of the median number of 549,000?

Dr. WHITE. Yes; but this is the number that came out if one used the midpoint value for being assured the population would increase. It is a less certain number than virtually certain which was our original proposal, but after seeing the testimony and given the record, we felt that was too harsh and we increased it.

Mr. LEGGETT. I do not understand how you made the determination that one number is too harsh and another number is what the law requires?

Dr. WHITE. Well, the purpose of the hearing is to have consultation of the views of various groups. We make our initial proposals based on our best judgments on how to determine the provisions of the act. We do that in all good conscience and, if the hearings are to have any value at all, presumably, then we should listen to the views expressed in the hearings. We heard views in the hearings which were different from ours and they convinced us.

Mr. LEGGETT. They convinced you to use the median rather than the 95 percent figure?

Dr. WHITE. This one we found to be convincing.

Mr. LEGGETT. I do not understand how you exercize your discretion. You used median in one case and the 95 percent accurate figure in another case?

Dr. WHITE. No. The reason we used the median in this case is that the population of the white belly is very high—74 percent of its original stock, so that the stock of porpoises is very good and at a healthy level.

Given the fact that it was that high, we felt we could relax our proposal and this was supported by the views of the Marine Mammal Commission and the Environmental Defense Fund in the record.

Mr. LEGGETT. And the eastern spinner at 1.3 million is what percent of the original?

Dr. WHITE. 54 percent, so you see there is a very large difference of 20 percent in the status of the stock of the eastern spinner and the white belly.

Mr. LEGGETT. Is the white belly, in fact, increasing in number?

Dr. WHITE. No; it is declining, but it still is in very good shape. We regard 74 percent as in very good shape.

Mr. LEGGETT. All right, how does a tuna fisherman go about determining when they make their sets where their stock are mixed or not?

Mr. SCHONING. Yes, sir, Mr. Chairman.

Mr. LEGGETT. How do you address that in your regulations? You just say no setting on mixed stocks?

Mr. SCHONING. That is correct.

Mr. LEGGETT. If you got 1 in with 1,000, is that mixed?

Dr. WHITE. That is the difference between accidental and incidental. Mr. Chairman.

Mr. LEGGETT. If you got 1 with 1,000, is that mixed?

Dr. WHITE. If you knew that there was one in there and you set on it then, indeed, you would be consciously taking one. But if you set on a school and you thought there were no eastern spinners in there, and then you found some in there, we would regard that as accidental.

As a matter of enforcement policy, we would not enforce against such accidental taking.

Mr. LEGGETT. In your experience, what number of porpoise schools in this eastern Pacific area are, in fact, mixed?

Dr. WHITE. I have various statistics, but the one I think is meaningful is that 20 percent of the yellowfin tuna are taken in connection with mixed schools.

Now, I think it is also true, however, to say that some captains take a much higher percentage of the yellowfin in connection with mixed schools.

Mr. MANNINA. Bob, it is my understanding from Dr. Fox it is more in the order of 48 percent in 1976 and 43 percent in 1975. Can you clarify that?

Dr. WHITE. Mixed schools with spinners?

Mr. MANNINA. Yes.

Dr. FOX. Dr. White was referring to mixed schools with eastern spinners.

Mr. LEGGETT. All we are talking about is mixed schools with eastern spinners. We have that straightened out. I was led to believe by the industry and others that perhaps 60 percent of the schools were mixed with eastern spinners.

Dr. WHITE. I have no reason to doubt these statistics that the industry is presenting but I think they are somewhat different from the statistics that I presented and both may be consistent.

Mr. LEGGETT. Is your statistic based on the results of your observer findings?

Dr. WHITE. I believe they are, sir.

Mr. LEGGETT. All right.

Does anybody else have any questions? Well, we can get to what industry has in mind.

Then, the question is, of that 20 percent of so-called mixed schools, how much are they mixed, Dr. White?

Dr. WHITE. I would have to ask Dr. Fox if he might comment on that.

Dr. FOX. It varies from a very small percentage up to close to 100 percent.

Mr. LEGGETT. All right, so you have got a complete variation of mixing.

Then the next question would be, how do you detect the difference prior to the time you get a porpoise in your net, its varietal ancestry?

Dr. WHITE. My understanding, although Dr. Fox can comment, is that it is possible to detect the difference between various species of porpoise.

Mr. LEGGETT. I hope it is possible to detect the differences between the various species of porpoise. The question is, how do you do it while you are fishing?

Dr. WHITE. The captain presumably does it. He is experienced with these things. He has been doing it for a long time.

Mr. LEGGETT. Have you ever done it?

Dr. WHITE. No.

Mr. LEGGETT. Have you got people in this room who have?

Dr. WHITE. There may be lots of people in this room who have done it.

Mr. LEGGETT. In the NOAA staff?

Dr. WHITE. No. Not on our headquarters staff.

Mr. LEGGETT. Has anybody on your staff heard how you do it?

Dr. WHITE. We have people in the field, Mr. Chairman.

Mr. LEGGETT. All right, what is your understanding of how you believe it is done from whatever source of information you have?

Dr. WHITE. Well, I assume that the captain sights a school of porpoises and can identify what kind of porpoises they are. He can identify whether it is a mixed school. He can identify several species because some of the species, for example the spinner, have peculiar characteristics. He makes a judgment as to whether the school is mixed and the regulations prohibit setting on it.

If he finds, upon setting on a pure school that he has eastern spinners and this is done accidentally, then you have a situation where our enforcement policy——

Dr. WHITE. That is my understanding.

Mr. LEGGETT. So if the captain is zapping along and somebody up in the crow's nest says: Porpoise, ho!, or whatever he might say, and you zap out the ski boats, and they start charging over and captain is looking through his periscope or telescope, assuming he does not see any pirhouettes going on, why then, pretty soon, his slave ship starts backing down and starts charging around to make the quarter-mile encirclement and providing he completes the encirclement with no pirhouetting, why, then, presumptively, you are not setting on a mixed school.

Am I stating the case as you assumed from the information you have available to you?

Dr. WHITE. Yes; that sounds like it.

Mr. LEGGETT. Then they start sucking in the bottom of the net and they complete the purse, so you then arrive at a point where say the purse is say, a few hundred yards across, and say you find one or two pirhouetting, I would expect perhaps at that point that might be an accidental number pursuant to the regulations and then you complete the take, hopefully getting all of the porpoises, and particularly the pirhouetting ones, out of the net.

At what point, what happens as you make this encirclement, if you get it down to say 200 yards, and you have got the porpoises collected, and you find lots of pirhouetting going on, Dr. White?

Dr. WHITE. We do not believe it would be practical to avoid the set, and if the thing was done with every good intention we would consider it an accidental thing, unless half of the porpoises in there turn out to be spinners, in which case, there would be some reason to believe that it was not accidental.

Mr. LEGGETT. Is it your general impression that if you have got a reasonable, significant mix of spinners in a set that normally you would be able to determine that prior to the encirclement, Dr. White?

Dr. WHITE. We are hoping in most cases that they will be able to do so.

You have people here, captains and people from the industry, who will be able to do that.

Mr. LEGGETT. Do your regulations address themselves to that?

Dr. WHITE. If a captain was able to determine that there were spinners in a porpoise school, he would not be allowed to set on it. We have to count on the good faith of our tuna skippers.

Mr. ANDERSON. Could I interject one question?

Mr. LEGGETT. Mr. Anderson.

Mr. ANDERSON. How do you distinguish between the white belly pirhouette and the eastern spinner?

Dr. WHITE. I believe they are distinguishable.

Dr. FOX. We are talking about spinners, which is one species. We are talking about eastern spinners and white belly. There are racial and slight morphological differences which constitute a stock, but not a separate species. There are certain things which are very distinguishable between the large adults, particularly the males. The large male eastern spinners have a forward facing dorsal fin. There is difficulty in identification when looking at small females or juveniles and young adults to tell the eastern spinners from the white bellies.

Mr. ANDERSON. Do they pirhouette differently?

Dr. WHITE. They only pirhouette when they are free ranging. I do not believe that they pirhouette when they are in the net.

Mr. ANDERSON. So you do not really see them?

Mr. LEGGETT. As they are ranging, so as you approach the encirclement, would you find them doing their peculiar activity?

Dr. FOX. They only pirhouette if they are free-ranging. If the school has been stopped by the action of the net to encircle it, I do not believe that you would see them pihouetting at that time.

Mr. LEGGETT. From your knowledge and experience in the industry, and I expect you are the most knowledgeable person in NOAA, with the exception of perhaps some observers, that you supervise, is it your opinion that a captain can discriminate between a mixed school of eastern spinners and other kinds of porpoise at any time prior to the time that the set is complete?

Dr. WHITE. Well, there are certainly other people in the program who have extensive field experience and that could answer the question better than I. It is my understanding from those people that there is a likelihood of identifying the difference between eastern and white bellied spinners, particularly if you are in two relatively distinct geographical areas. In an area between these two centers of distribution you are likely to find animals that look like one or the other because it is all one species. These are stock differences.

Mr. ANDERSON. I am told it is very difficult to tell the difference between a white belly and an eastern spinner?

Mr. LEGGETT. What we are trying to do is to save fish and save porpoise and keep people out of jail and avoid paying the finders fees for fines. A law that is vague, that has criminal sanctions—of course, some of you are going to find it very difficult for any court to enforce it. What we want to find out, since your regulations are really implementing a criminal law, the extent to which your regulations are precisely definable and identifiable.

What do you do in this situation, Dr. White, where there is a difference of opinion as to whether or not you are setting on eastern spinners as between the captain and the observer?

Dr. WHITE. I would have to deal with the individual case, but the captain is the commander of the vessel.

Mr. LEGGETT. So under the regulations, the captain would not be under any instructions from the observer to either abort or complete a set?

Dr. WHITE. Yes. Our regulations do not give our observers any authority to tell a captain what to do.

Mr. LEGGETT. All right. But if a captain did set on what may later be determined to be a mixed set, a mixed group, and I guess over the objections of an observer, he well might be prosecutable under the regulations that we have in effect?

Dr. WHITE. One would have to judge on an individual case as it came up.

I would hope that we would be judging these things in good faith, and that the captains would be operating in good faith. We understand some of the difficulties inherent here. We are not out to prosecute people or put people in jail frivolously. We take people very seriously.

Mr. LEGGETT. I understand that, and I think you have a reasonable approach to the whole thing. But as we found out in the past, neither you nor I, necessarily, control the administration of what we do here.

Dr. WHITE. That is correct, Mr. Chairman.

Mr. LEGGETT. Once the law is in effect, once the regulation is in effect, then under our three-cornered system of administering the law of the United States, another branch of the system then takes over, and I am concerned that we explore this and get this history on the record as to exactly what we are contemplating in these regulations.

All right. It is now 12 o'clock, so I think this might be a good time to adjourn and come back, I think, at 1:15.

Dr. WHITE. Mr. Chairman, perhaps you could take some of the other witnesses. I have an appointment with Secretary Kreps to discuss some aspects of the tuna-porpoise issue at 1:15. I would like very much to be there, with your permission.

Mr. LEGGETT. I guess some of our witnesses have to be there. Mr. Butler has to be there.

How many people are going to meet with Secretary Kreps?

Just you and Mr. Fensterwald? I guess that is an important meeting too.

I would like you to be here when we resume. How long is your meeting with the Secretary going to take? All afternoon?

Dr. WHITE. I do not know how much time has been set aside, probably half an hour.

Mr. LEGGETT. We have room 1334 at 2 o'clock, so why do we not adjourn at this point and reconvene in room 1334 at 2 o'clock. That is our regular committee room. And if anybody has any questions that they want me to propound to any of the witnesses, present them in due course to the Chair and we will see that they are propounded, and that might be a little bit easier than having questions asked from the audience.

The committee will stand adjourned.

[Whereupon, at 12:02 p.m., the subcommittee recessed, to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

Mr. LEGGETT. The meeting of the subcommittee on Fish and Wildlife will please come back to order.

Under our rules we can hold these hearings when two or more members are present. It appears that two or more members are present.

The Chair will state that during our morning sessions, allegations were made by one distinguished member of this committee that degraded some of the major participants in this hearing, and I would say that is not particularly healthy. I believe we all know what the situation is with respect to the reports by observers, and reports by nonobserver crews. We know very well the numbers are different. The numbers are not six to one, but they are different.

I don't believe it will be helpful to anyone to engage in an extended debate as to the veracity of statements made which apparently are not relied upon in the calculations made by the National Marine Fisheries Service, so I am going to deem the allegations made by my colleague in that respect are completely denied for the purposes of this hearing, and we will then proceed to review in this hearing only the matters which are succinct and probative and helpful in reaching conclusions which we are all after.

So, let me see, when we adjourned we were right up to the point where I was going to ask you, Dr. White, a question.

You have indicated that you have attempted to promulgate regulations which you now admit might be inconsistent among themselves. The Chair has its own view about that, but you have indicated that you have attempted to promulgate regulations to the very best of your ability within the framework of the law, and pass regulations and judicial interpretations as you and your staff know it?

Dr. WHITE. That is correct, Mr. Chairman.

Mr. LEGGETT. That is where we are.

Now the question is, are you satisfied with the current state of the industry and the porpoise as a result of the promulgation of those regulations?

Dr. WHITE. No; I am not satisfied on both grounds.

Mr. LEGGETT. All right, Dr. White.

The question is, would you be more satisfied with a modification of the law?

Dr. WHITE. I have indicated already, Mr. Chairman, that in my personal view, some modification of the law would be desirable.

Mr. LEGGETT. All right.

My colleague, aforementioned, has cross-examined you with respect to the Hayakawa bill. I do not know whether that is pertinent or not. I suspect, as indicated, you provided a drafting service with respect to that legislation. Certainly, it has not been, to my knowledge, an administration bill, lest you might have submitted the bill to the chairman of this committee for his review prior to the filing, so the question would be are you contemplating an administrative position on this matter?

And, if you are, what is your time frame for resultion?

Dr. WHITE. The administration is now freshly considering the various options available to it, given the situation that we now have. I can't give you an exact time frame, but it is going to be very quick. We would like to take whatever action is taken quickly.

Mr. LEGGETT. I could ask you about the number of fish taken by the industry to date, but I think it might be better to ask that question of the industry rather than the National Marine Fisheries Service; so if you will wait around, we will all be tracking on the same track.

Mr. Trible?

Mr. TRIBLE. No questions.

Mr. LEGGETT. Mr. Anderson?

Mr. ANDERSON. I have not found my notes.

Mr. LEGGETT. No questions are really required at this point.

Mr. ANDERSON. I have a couple here if I can find where my notes are from the previous time.

I am a little confused, Dr. White, with some of the figures that we have, and some of the statistics that were given out here.

I am more confused with this 5 percent—I think I have my figures here now.

I am confused by the statement that was put out by our committee, but they were using figures that came from your department, from NOAA, and from the NMFS.

This is the bottom paragraph, and it says, "in commenting on the definition of eastern spinner as depleted, the Director of the National Marine Fisheries Service has said, 'since I concluded in my decision that the eastern spinner dolphin is depleted, no incidental take of the eastern spinner dolphin can be permitted, even though about 6,600 could be taken with a virtual certainty that the population will increase with that level of mortality.' "

I am a little confused with that. What do we mean by optimum sustainable population? If a population is a certainty that the population will increase with a level of mortality that could even be depleted by 6,600, wouldn't that be an optimum sustainable population?

Dr. WHITE. Well, the scientists at the conference called to look at the optimum sustainable population did come up with a definition of optimum sustainable population, and that definition provides that the lower bounds of that level of optimum sustainable population is in some range between 50 and 70 percent of the initial population.

With reference to the 6,600 for each stock of porpoise, an estimate was made as to how many of a stock of porpoise could be taken and still be virtually certain that that stock of porpoise would increase.

In the case of the eastern spinner, that is what the number turned out to be, and all the scientists involved agreed to that number. But that is not related directly to whether the Eastern Spinner is or is not above or below the lower limits of optimum sustainable population.

Mr. ANDERSON. I think this is where you are losing me. If everyone agrees you could take 6,600 and still have an increasing population, then what is it we are talking about?

Dr. WHITE. Well, this is one of the suggestions that we have made, for example, for amending the act. The act requires upon the declaration of depletion, all taking cease. There must be a zero take. And since we have declared the eastern spinner to be depleted, then there is a zero take.

One of the concepts we can deal with is whether, indeed, you can have some take even if a stock of porpoises is depleted.

In my view, it is a perfectly sound thing to do, even if a stock is depleted, to allow some take as long as that take would insure the continued increase of that stock.

In the case of the eastern spinner, all agree that a take of 6,600 would not adversely affect the stock.

Mr. ANDERSON. Yet if you allow them 5 percent, because I think you are using 5 percent, he said the reason mixed schools are protected is that the eastern spinner porpoise which constitute a small fraction of the mixed school, in the order of 5 percent—if you took 5 percent of the roughly 60,000 that you are going to allow to take, that would be roughly 3,000. If you follow the same proportion, it would be half or less than half of the number that could be taken and still have an optimum sustainable population.

Dr. WHITE. The law requires that there be no take of a depleted species. I have indicated here this morning, of course, that in an accidental take where with good intentions a tuna fishing captain sets on a school in the full belief there were no spinners in it, and he did find a spinner in it, we would not enforce against that since it was accidental and not intended.

There will be a number of animals taken that way. We would become deeply concerned if the number of animals, that is, accidentally, were to exceed 6,600, because, in that case, we would have a situation in which we would not be virtually certain that the stock would increase.

Mr. ANDERSON. Getting back to the numbers, I understand your department, with the observers, estimated that the total kill for 1976 was 104,000. That was based, I guess, on the first half of the season, and you estimated the second half would be 104,000, and that 5 percent of these were the eastern spinners.

Again, that would bring you down to roughly 5,000, even knowing that the second half would probably be less, because these would be more of the white bellied spinner.

Dr. WHITE. Our estimate of the eastern spinner take in 1976 was 7800.

Mr. ANDERSON. As a result of this figuring, it would be a little less than that.

You have seen the statement put out by the committee, the memorandum put out by the committee with your statements here on.

I wonder if all of these statements were figures that you people agreed on?

Dr. WHITE. I am not sure which memorandum that is, sir.

Mr. ANDERSON. I am having a difficult time keeping your figures straight in my mind, and the more I listen, the more confused I am getting.

Dr. WHITE. No, we have not seen this memorandum, sir.

Mr. ANDERSON. You have not?

Dr. WHITE. No. Some members of my staff conceivably could have, but I have not.

Mr. LEGGETT. We do not normally share that with witnesses.

Mr. ANDERSON. Thank you, Mr. Chairman.

Mr. LEGGETT. Thank you, Mr. Anderson.

One thing we had to clear up at the time we adjourned, the testimony was this morning that 20 percent of the overall porpoise sets were involved with eastern spinners. I had some private colloquy with Mr. Schoning as to whether or not that 20 percent also included the other stocks upon which you have determined there would be zero taking.

Dr. WHITE. Mr. Chairman, I agree that there is room for some confusion in citing all of these percentages. I think it would be a good idea if we let Dr. Fox address the question of the various percentages, mixed schools' relationship to the yellowfin tuna so we can clarify the record on this, sir.

Mr. LEGGETT. All right, Dr. Fox.

Dr. FOX. Thank you.

Mr. LEGGETT. Speak close to the microphone.

Dr. FOX. These numbers are our averages for 1974 from the data that was accumulated through September, 1976.

The average percent of porpoise sets involving mixed schools is 49 percent.

Of that, 23 percent was associated with eastern spinner schools, and 26 percent were white bellied schools. There was some overlap, but that was factored out to give these two numbers.

Mr. LEGGETT. All right.

Dr. FOX. In terms of catch figures, 58 percent of the yellowfin catch on porpoise is taken with mixed schools; 23 percent of the yellowfin catch is taken in mixed schools associated with eastern spinners.

Mr. LEGGETT. Twenty six percent?

Dr. FOX. Twenty three percent.

Mr. LEGGETT. Of the catch?

Dr. FOX. The yellowfin tuna associated with porpoise is in mixed schools with porpoise, including eastern spinners, and the number is 35 percent for mixed schools of eastern spinners and white belly, and those add up to 58 percent.

Mr. LEGGETT. Are there other species besides the eastern spinner which is depleted which would constitute a maximized school of porpoise on which there could be no setting, or do those species normally occur also with the eastern spinner. Would the eastern spinner number of 23 percent be a general average of the number of schools upon which there could be no setting under the existing regulations?

Dr. Fox. Well, there are no other species or stocks that have been determined to be depleted. There are four stocks of which there is no take allowed because the information is missing as required under section 103(d) of the act.

Mr. Leggett. So that does not affect our result?

Dr. Fox. No; the amount of take normally of those is so small as to be negligible.

Mr. Leggett. All right.

I was a little slow in grasping this. Forty nine percent of all the yellowfin is on mixed schools, is that right?

Dr. Fox. No; 49 percent of the porpoise sets are on mixed schools; 58 percent of the yellowfin tuna associated with porpoise comes from mixed schools of any sort.

Mr. Leggett. Then the next two numbers were 23 percent of the catch associated with yellowfin were on eastern spinner mixed schools, right?

Dr. Fox. Right.

Mr. Leggett. All right. What percentage of the yellowfin tuna is taken on porpoise?

Dr. Fox. Long term average of roughly 70 percent of the U.S. yellowfin tuna taken is associated with porpoise.

Mr. Leggett. Seventy percent. So if you reduced the 23 percent on which there can be no setting by roughly 30 percent, that would give you a rough figure of about 15 percent of the total yellowfin that could not be set on as a result of these regulations?

Dr. Fox. Under normal fishing practices, yes.

Mr. Leggett. Then the next question would be, do the boats that catch yellowfin also catch skipjack?

Dr. Fox. That is correct.

Mr. Leggett. Normally those boats only catch two kinds of fish.

Dr. Fox. Well, in major proportion, yellowfin, skipjack, bluefin tuna would be third, and then there are others.

Mr. Leggett. They don't catch the bluefin in the Pacific.

Dr. Fox. Yes; they do.

Mr. Leggett. Of the total catch of the bluefin and skipjack and yellowfin, how do those percentages break down in general?

Dr. Fox. Yellowfin accounts for about 70 percent of the tuna catch.

Mr. Leggett. OK, in order to determine the exact effect of the 15 percent reduction on setting, you would have to reduce the 15 percent by another 30 percent or reduce it down to a figure of about 10 percent of the overall fishing volume which would probably be affected by the regulations now set up to be promulgated?

Dr. Fox. That would be an overall average.

Mr. Leggett. I understand that every ship is not average.

All right, Mr. Hughes?

Mr. Hughes. I have no questions, Mr. Chairman.

Mr. LEGGETT. All right. Mr. McCloskey has used all his time, and I think those are all the questions at this point.

Dr. WHITE. Mr. Chairman, I just want to clarify the record that we made this morning whether or not we have observers who observed porpoise being taken this year. There was a period in which Judge Enright's decision was valid, and we took observations, and we have for that 4-day period a record of porpoises—four were taken.

Mr. LEGGETT. How many tons of tuna?

Dr. WHITE. About 100 tons of tuna.

Mr. LEGGETT. All right. Very good.

Thank you very much, gentlemen.

Mr. LEGGETT. It might be good to hear from Mr. Felando at this point.

Mr. FELANDO. Mr. Chairman, we would like to delay our presentation.

Mr. LEGGETT. All right.

Mr. Edney.

Mr. MCCLOSKEY. Mr. Chairman, there are some questions I would like to ask Mr. Felando.

Mr. LEGGETT. He is scheduled later.

Mr. MCCLOSKEY. I understand some remarks have been made out in the hallway that I would like to challenge.

Mr. LEGGETT. You can do that in due course.

Mr. Edney.

TESTIMONY OF STEVE EDNEY, PRESIDENT, UNITED CANNERY INDUSTRIAL WORKERS

Mr. EDNEY. Mr. Chairman, my name is Steve Edney. I am president of the United Cannery Industrial Workers, representing some 9,000 cannery workers in the United States and its territories, the territory of Samoa, and the Commonwealth of Puerto Rico.

Also, I would like to take this opportunity to thank you for your courtesies in the past and now I would also like to compliment you on your handling of these meetings. It is my belief that you have been fair to both sides.

I also would like to say that I am a little saddened by what was said here today.

Mr. LEGGETT. Well, as I indicated, we don't want to get into any personal epithets with respect to anybody. We want to stick to the facts. We are going to be here all night.

Mr. EDNEY. All right, I will back up.

I would like to say this. Our people are very much upset by the new proposed regulations by NOAA. We believe that the considerations of our people have not been given proper consideration. They have not given proper considerations to our needs and our benefits in this at all. We think that this Government is the government of the people and for the people, and therefore, you must deal with human factors in this whole fight.

We favor, as we stated before, and we are on record as favoring, some program to help the porpoise problem. We have been on record for that, and we support this. We feel that the present proposed regulations is not a crisis as far as we are concerned. It is a disaster

As soon as the supply of fish now in the canneries and on the boats that have come in because they could not fish under the proposed regulations run out, our people will be out of work. We don't think it is the purpose of Congress or the executive branch or the judicial branch to put people out of work. We believe that to work, to have a job, is what this country is all about and what built this country and we cannot understand why anyone or any group of people would be so callous toward human beings.

I listened this morning, and I hope this is not personal. I don't mean it that way, of how they came to the decision to come on the side repudiating the administrative law judge's recommendations, and they said it was close, almost as if someone tossed a coin. And it came down one way. We are playing with 30,000 jobs. The spinoff is much more than that. We have people who, if they don't work in a given week, there is no paycheck the following week. These people can't pay their bills, can't send their children to school without a paycheck. And I have heard a lot that Congress, the Government, that is, the administration—and I do believe the administration will do something about the job situation—wants to spend $4 billion to create 600,000 jobs.

I wonder if anyone has stopped to calculate how much of the cost to destroy 30,000 jobs, maybe 50,000 jobs? I wonder how much cost is there in money? There are other factors you ought to consider as to what you do to these people who have worked 15, 20 or 25 years in an industry. This is all that they know. You are going to train them to do what? They are old, many of the people, women who are old, men who are old. And they have language problems. What are they going to do?

It has been a sad day for us, and, you know, in coming here, I am most happy to come before your committee, Mr. Chairman, because I believe that you are a fair man. But, frankly, I would rather be somewhere else, because there are other things we can be doing to help our people.

I wish some of the people who feel so strongly on the other side, I wish they could stay in my office and hear what I am getting from the people. I say I am sort of glad to get out of there, because I don't have the answers to tell them why. They ask me why they are doing this, and I don't have the answers.

I doubt if anyone here has the answers, because most of this is made on misinformation, guessing and hoping it will come out all right.

Mr. Chairman and committee members, I say to you again, the critical issue here is jobs, and I don't think the unemployed or the poeple who are now being employed are going to sit still and see that their jobs are taken away.

Just as I left, one extreme group put out a leaflet in the canneries, and they are stirring the waters on the porpoise thing. I don't care to mention the name of the organization, but there are people who traffick in this sort of thing. But I would hope again that you would recognize that it is jobs that we must be concerned with. We must find a way to put these tuna boats back to sea do do what they are supposed to do and to keep our people working.

I want to thank you, Mr. Anderson, for your interest in this. I know that you will do everything you can to help us in this matter. But time is of the essence. We need immediate help. We need help now. We need a long range solution, but we cannot wait until the last fish has gone through the cannery and the people are out on the streets. We cannot do this. I am asking you people to help us, and it should not be necessary to come up here and beg for relief to keep a job. We do not want to go on relief. We do not intend to go on relief. We want some action to save the jobs we have got, and you will save millions, perhaps billions, because if this is carried forward, what you are doing to us today is what industry will do to us tomorrow. And where do we go? How many more thousands of people will be put out of work? I hope that all of us will recognize that we ought to get together, environmentalists, Congress and all, and let us get this problem settled and keep these people working.

Thank you very much for your courtesy which you have shown here, and if there are any questions I will be glad to try to answer them.

Mr. LEGGETT. Very good.

Mr. Anderson?

Mr. ANDERSON. I just want to thank Mr. Edney for coming here, for his excellent remarks, and I want to say that the remarks he made are the remarks we hear in our district.

He is from our area, and we have his concern right in front of us. And everything he says is just what the people in my district feel, and I want to commend you for it.

Mr. LEGGETT. Mr. Edney always does a high job of excellent in representing the workers in this industry. You express yourself very well.

Mr. EDNEY. Thank you, and I would like to compliment you gentlemen too.

Thank you.

Mr. LEGGETT. Now, we have Mr. Butler.

Oh, we have a rollcall going.

Why don't we tend to the House business, suspend for a few minutes, and then we will hear from Mr. Butler.

[A brief recess was taken.]

Mr. LEGGETT. The subcommittee will please come to order.

As I indicated, the witness at this point will be Mr. Bill Butler, Washington counsel for the Environmental Defense Fund.

Mr. Butler, we have your statement of 11 pages which will be included in the record at this point. You can proceed to read it until other members of the committee come in, and then you can expand upon it.

Mr. BUTLER. Thank you very much, Mr. Chairman.

I wonder whether Col. Milton M. Kauffman, president of Monitor, Inc., can join me? We may combine our testimony.

Mr. LEGGETT. Certainly, Colonel Kauffman can join you at the table.

Would you want Christine Stevens to join you at the table?

Mr. BUTLER. Certainly.

Mr. LEGGETT. Christine, would you want to join them?

Mrs. STEVENS. I want to be at the end.

Mr. LEGGETT. All right. I would ask Mr. Fensterwald to join him if I thought it would be right.

[The following was received for the record:]

STATEMENT OF WILLIAM A. BUTLER, GENERAL COUNSEL, ENVIRONMENTAL DEFENSE FUND ON BEHALF OF EDF, THE SIERRA CLUB, DEFENDERS OF WILDLIFE, NATIONAL AUDUBON SOCIETY

National Marine Fisheries Service Director Schoning's February 24 final determination on 1977 regulations to govern incidental take of porpoise by tuna fishermen was a split decision. It was not a victory for environmentalists, although we will try to live with it. Neither was it a defeat for the industry, which nonetheless claims it cannot live with it, a contention patently false. The decision certainly should not occasion amendment of the Marine Mammal Protection Act.

As we expressed in our February 17 testimony before this committee, we believe that NMFS misjudgments and lassitude in 1976 have been the major cause of current perturbations adversely affecting the interests of both environmentalists and the industry. Nonetheless we are willing to look ahead, not back, in a spirit of constructive conciliation. We would be remiss, however, if we did not take this opportunity to detail for the committee the basis for some of our unhappiness with Director Schoning's February 24 determination, since the industry is attempting to make it appear it was the sole, or at least major, loser in that decision.

Our dissatisfactions with the decision include the following:

(1) The 59,000 porpoise quota is still too high;

(2) OSP is defined as a range between 50–70 percent of pre-exploitation population levels, whereas we believe OSP to be the pre-exploitation population levels themselves;

(3) Provision is made for observers only while the quota is not yet met—after the quota is met observers are to be returned to port despite their obvious continued usefulness for compliance and scientific observation purposes;

(4) At-sea proficiency tests are not required of skippers before receiving certificates of inclusion;

(5) Having observers on 100 percent of the trips is not required;

(6) No provision is made for increased U.S. pressure on the IATTC to set up an international observer program;

(7) No guidelines are offered skippers on conditions of wind, sea, and darkness under which not to set;

(8) The import provisions do not require foreign governments to describe recent enforcement efforts of whatever laws they have allegedly in effect protecting marine mammals; and

(9) The import provisions fail to define what is meant by the power given the NMFS Director to permit imports from foreign countries which in his opinion do not have an "incidental mortality and serious injury rate in excess of that which results from fishing operations under these regulations."

(10) We are also unable to comprehend how last year's kill (until November 11) could have been 104,000, as is now estimated by NMFS, when the 1976 quota was 78,000, even recognizing litigation prolonged the season three weeks. Nor do we understand how NMFS contemplates preventing such overshooting of the mark in 1977.

In short, we have much of which to complain, yet adhere to our position before this committee February 17 that amendment of the Marine Mammal Protection Act is unnecessary.

The industry does not feel so constrained: it combines loud and lusty complaints about the 1977 regulations with frantic appeals for legislative relief. Its claims of irreparable injury are grossly exaggerated.

1. The proscription on taking Eastern Spinner Porpoise.

The industry asserts that the ban on taking of Eastern Spinner Porpoise (because found by the NMFS to be depleted) prevents fishing on mixed schools, thereby eliminating most setting on porpoise. The facts are otherwise. Eastern Spinner Porpoise are found relatively close to shore, within the CYRA internationally controlled zone. The permissible quota of tuna from this zone is likely to be met by late March or early April. Then the fleet must fish outside the CYRA, where the porpoise found are predominantly the Offshore Spotted and White-Bellied Spinner, both of which may be taken, and not the proscribed and depleted Eastern Spinner. Inside the CYRA, Zone A, tuna fishing is only 30–40 percent on *any* species of porpoise, Eastern Spinner included. Other methods are more generally used here. Outside the CYRA, in contrast, setting on porpoise comprises up to 95 percent of sets. Obviously it is the White-Bellied Spinner and Offshore Spotted Porpoise, both of which may be taken, which are of primary importance to the industry, rather than the Eastern Spinner.

The industry points out that boats in port when the CYRA is declared closed may make "one free trip" into the CYRA, so setting in Eastern Spinner territory could theoretically continue into May. This is true, but means only that boats in port when the CYRA quota is closed and hence eligible for the "free" trip will have to choose between fishing in the CYRA avoiding Eastern Spinner, or moving out of the CYRA (as they will eventually do anyway) to fish on Offshore Spotted and White-Bellied Spinner.

The industry complains that fear of unintentional take of even one Eastern Spinner, given the Act's penalties, will inhibit any setting on porpoise since it is not always possible to be sure whether a few individuals of the proscribed species are in a school. However, the characteristic twisting leaps of the Eastern Spinner, plus the unique cant of its conspicuous dorsal fin, make this species one of the easiest of porpoises to identify.

It is true that evidence at the recent adjudicatory hearing on the 1977 quota did show that 7 percent of the time spinner porpoise, species unspecified, have shown up in sets initially believed to be of pure spotted schools. In its briefs to the Administrative Law Judge, NMFS recognized this fact and said enforcement actions would recognize the possibility of good faith errors. Intent *(scienter)* is an element to be considered in determining whether to apply the civil and criminal penalties of any statute, including this one, absent specific language to the contrary. If observers and captains make infrequent and ultimately insignificant errors in failing to identify Eastern Spinners travelling with other species, and set upon them acidentally, the NMFS has already gone on record as saying it will be understanding, providing every effort is subsequently made to permit the mammals to escape alive. Indicia of good faith error will be the frequency, number, and magnitude of such "mistakes." The entire NMFS regulatory scheme is built upon good faith judgment of skippers—enforcement policy regarding the proscription or take of Eastern Spinners should be no different in this regard, requiring of skippers no more than is possible short of ceasing to set on porpoise entirely.

We ourselves have recognized the impossibility of avoiding occasional mistakes by advocating unintentional accidental take of Eastern Spinners up to 6,500, specifically to take account of the 7 percent margin of possible error. To permit *intentional* take of this depleted species, however, would not only be in violation of law, but would also, when combined with the inevitable unintentional take, result in a total kill far higher than what the species can absorb and still grow in population size with a virtual certainty, the NMFS (and Act's) goal.

2. *The 59,000 total porpoise quota.*

The industry alleges the total quota is below the level required for the fleet to operate profitably. However, assuming no porpoise taking until April, the quota is set at an annual rate of 90,000, the high end of what the industry's own witnesses testified at the hearings they required. Further, last year 20 boats equipped with the fine mesh net required for all boats this year had such low kill rates that if extrapolated across the fleet, less than 10,000 porpoise total would have been killed in 1976. Not only will all boats be equipped this year with fine mesh nets, but use of new techniques—longer "backdown" periods guided by men in rubber rafts and face plates at the corkline assisting porpoises out of the net—will greatly reduce mortality, as illustrated by the results of the recent cruise of the *Elizabeth C.J.* Further, last year only a small fraction of the fleet's skippers and boats were responsible for a disproportionately large percentage of the kill. Industry self-policing for the common good by means of the "skippers' panel" has already dealt in the last few weeks with problems of inept or untrained skippers and ill-equipped boats. Ridding the fleet of these Jonahs or solving their problems will significantly diminish mortality.

In short, the evidence clearly suggests that the industry can stay within its 59,000 quota.

3. *The economic effects of the regulations.*

The industry alleges that the decision on 1977 regulations has required the fleet to return to port since it cannot operate under such terms profitably. However, much of the fleet would have been returning to port within the next few weeks anyway, albeit perhaps not so early, to gain eligibility for the "one free trip" into the CYRA as described above.

Speaking more generally, the American tuna fleet has long suffered serious economic problems completely unrelated to the porpoise question. The fleet is overcapitalized, with newer vessels heavily mortgaged and suffering inflated operating expenses, such as for fuel, not foreseen when they were constructed. Despite the fact that 1975 and 1976 were, measured by tons of tuna landed, the most sucessful fishing years in history for the U. S. fleet, the average boat lost money according to government figures, covering variable but not fixed costs. The U. S. fleet faces increased foreign competition (ironically much of it U. S. built, crewed, and subsidized) for a diminishing resource. The price of tuna has not substantially changed for 15 years, evidence of market saturation and/or buyer resistance and/or oversupply. Employment in canneries has been diminishing measured by hours worked ever since 1973, when no porpoise quotas were in effect. Automation and non-unionized Puerto Rican labor have affected mainland U.S. canneries far more than any porpoise regulations.

In short, the U. S. tuna industry is troubled financially, and is ripe for an economic shake-out completely unrelated to the porpoise question. There is no reason to make the porpoise the scapegoat for investor miscalculations in this industry.

4. *Taking of porpoise before April.*

The industry complains that whatever the likely ultimate effect of the NMFS Director's regulations, the fleet cannot gain any benefits from them for at least the 30 days prescribed by law before they go into effect. While this may be true, it overlooks the fact that most of the fleet would have spent part of this period in port anyway waiting to qualify for the "free trip." It also overlooks the fact that the question of interim relief is currently pending in the U. S. Court of Appeals for the District of Columbia, where the industry is being joined by NMFS and most environmental groups in its request that some porpoise fishing be permitted, to count toward the annual quota, prior to the 1977 regulations and permits taking effect. While the interim relief requested still would not permit taking of spinner porpoise, it would permit setting on other species, thereby improving the industry's capability for the next 4–5 weeks. Offshore Spotted Porpoise, the species that "carries" the tuna and is primarily set upon, would be available.

There is no way of knowing when and what the Court of Appeals will rule, but it is entirely conceivable it will favor interim relief now that the administrative decision is final, and the jurisdictional squabble between it and the U. S. District Court for the Southern District of California—San Diego is settled.

In summary, neither environmentalists nor the industry are entirely happy with the NMFS decision, either its substance or timing. The difference is that we are prepared to accept the results in a spirit of compromise, whereas the industry's reaction continues to be one of truculent obduracy. The Marine Mammil Protection Act was passed in 1972. Since that time the U. S. fleet has killed nearly 800,000 porpoise. Since 1974 when the industry became subject to the Act and the fleet's two-year grace period expired, there has been little evidence of industry compliance with the Act's "immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." NMFS annual mortality figures speak for themselves: 1974—99,000; 1975—135,000; 1976—104,000 in ten months, an annual rate of 130,000. Killing has plateaued at annual levels of over 100,000.

Five years after the Act was passed NMFS has finally gotten serious about preventing this carnage. We are willing to curb our impatience with what we see as a continual 1977 go-slow government policy on enforcing the zero kill goal of the Act because we feel solutions, at least partial ones, are now at hand, and we do not wish either to hazard loss of progress to date or to cause the industry true economic hardship. We do not understand why the industry cannot meet us halfway, rather than renewing its bellicose demands for legislative relief based upon exaggerated claims of economic ruination and practical infeasibility of implementation of the proposed regulations.

We would remind this committee of our testimony two weeks ago to which we adhere today—the Act is finally working. To weaken or destroy by amendment a decision-making structure painfully worked out by trial and error over the last five years would be a tragic mistake, particularly since the elements in the 1977 regulations most complained of now by the industry are of concern at best for only a few more weeks, and need never recur.

STATEMENT OF WILLIAM A. BUTLER, GENERAL COUNSEL, ENVIRONMENTAL DEFENSE FUND, ON BEHALF OF THE ENVIRONMENTAL DEFENSE FUND, THE SIERRA CLUB, DEFENDERS OF WILDLIFE, NATIONAL AUDUBON SOCIETY, AMERICAN LITTORAL SOCIETY, CHESAPEAKE CHAPTER, AMERICAN LITTORAL SOCIETY, CONNECTICUT CETACEAN SOCIETY, ENVIRONMENTAL POLICY CENTER, FRIENDS OF THE EARTH, INTERNATIONAL FUND FOR WILDLIFE PROTECTION—U.S.A., AND THE NATIONAL PARKS AND CONSERVATION ASSOCIATION; AND STATEMENT OF COL. MILTON M. KAUFMANN, PRESIDENT, MONITOR, INC.

Mr. BUTLER. I would like to say before I begin with my statement, in addition to the groups mentioned on the printed statement—any of those groups that want to attend at the table and volunteer information, please feel free to do so—that this statement is made on behalf of the following groups also: American Littoral Society, Connecticut Chapter of the American Littoral Society——

Colonel KAUFMANN. Chesapeake chapter.

Mr. BUTLER. Chesapeake chapter of the American Littoral Society, the Connecticut Cetacean Society except as to the acceptability of the 53,000 annual quota, the Environmental Policy Center, Friends of the Earth, International Fund for the Advancement of Wildlife, and the National Parks and Conservation Association.

Colonel KAUFMAN. International Fund for Animal Welfare, U.S.A.

Mr. BUTLER. You can see why I wanted the colonel to come up here.

Mr. LEGGETT. Thank you. You are doing very well so far.

Mr. BUTLER. National Marine Fisheries Service Director Schoning's February 24 final determination on 1977 regulations to govern incidental take of porpoise by tuna fishermen was a split decision. It was not a victory for environmentalists, although we will try to live with it. Neither was it a defeat for the industry, which nonetheless claims it cannot live with it, a contention patently false. The decision certainly should not occasion amendment of the Marine Mammal Protection Act.

As we expressed in our February 17 testimony before this committee, we believe that NMFS misjudgments and lassitude in 1976 have been the major cause of current perturbations adversely affecting the interests of both environmentalists and the industry. Nonetheless we are willing to look ahead, not back, in a spirit of constructive conciliation. We would be remiss, however, if we did not take this opportunity to detail for the committee the basis for some of our unhappiness with Director Schoning's February 24 determination, since the industry is attempting to make it appear it was the sole, or at least major, loser in that decision.

Our dissatisfactions with the decision include the following:

(1) The 59,000 porpoise quota is still too high;

(2) OSP is defined as a range between 50 to 70 percent of preexploitation population levels, whereas we believe OSP to be the preexploitation population levels themselves;

(3) Provision is made for observers only while the quota is not yet met—after the quota is met observers are to be returned to port despite their obvious continued usefulness for compliance and scientific observation purposes;

(4) At-sea proficiency tests are not required of skippers before receiving certificates of inclusion;

(5) Having observers on 100 percent of the trips is not required;

(6) No provision is made for increased U.S. pressure on the IATTC to set up an international observer program;

(7) No guidelines are offered skippers on conditions of wind, sea, and darkness under which not to set;

(8) The import provisions do not require foreign governments to describe recent enforcement efforts of whatever laws they have allegedly in effect protecting marine mammals; and

(9) The import provisions fail to define what is meant by the power given the NMFS Director to permit imports from foreign countries which in his opinion do not have an "incidental mortality and serious injury rate in excess of that which results from fishing operations under these regulations."

(10) We are also unable to comprehend how last year's kill—until November 11—could have been 104,000, as is now estimated by NMFS, when the 1976 quota was 78,000, even recognizing litigation prolonged the season 3 weeks. Nor do we understand how NMFS contemplates preventing such overshooting of the mark in 1977.

In short, we have much of which to complain, yet adhere to our position before this committee February 17 that amendment of the Marine Mammal Protection Act is unnecessary.

The industry does not feel so constrained: It combines loud and lusty complaints about the 1977 regulations with frantic appeals for legislative relief. Its claims of irreparable injury are grossly exaggerated.

1. *The proscription on taking eastern spinner porpoise*

The industry asserts that the ban on taking of eastern spinner porpoise—because found by the NMFS to be depleted—prevents fishing on mixed schools, thereby eliminating most setting on porpoise. The facts are otherwise.

Eastern spinner porpoise are found relatively close to shore, within the SYRA internationally controlled zone. The permissible quota of tuna from this zone is likely to be met by late March or early April.

Then the fleet must fish outside the CYRA, where the porpoise found are predominantly the offshore spotted and white-bellied spinner, both of which may be taken, and not the proscribed and depleted eastern spinner.

Inside the CYRA, Zone A-1, tuna fishing is only 30 to 40 percent on any species of porpoise, eastern spinner included. Other methods are more generally used here.

Outside the CYRA, in contrast, setting on porpoise comprises up to 95 percent of sets. Obviously it is the white-bellied spinner and offshore spotted porpoise, both of which may be taken, which are of primary importance to the industry, rather than the eastern spinner.

The industry points out that boats in port when the CYRA is declared closed may make one free trip into the CYRA, so setting in eastern spinner territory could theoretically continue into May. This is true, but means only that boats in port when the CYRA quota is closed and hence eligible for the free trip will have to choose between fishing in the CYRA avoiding eastern spinner, or moving out of the CYRA—as they will eventually do anyway—to fish on offshore spotted and white-bellied spinner.

The industry complains that fear of unintentional take of even one eastern spinner, given the act's penalties, will inhibit any setting on porpoise since it is not always possible to be sure whether a few individuals of the proscribed species are in a school. However, the characteristic twisting leaps of the eastern spinner, plus the unique forward cant of its conspicuous dorsal fin, make this species one of the easiest of porpoises to identify.

It is true that evidence at the recent adjudicatory hearings on the 1977 quota did show that 7 percent of the time spinner porpoise, species unspecified, have shown up in sets initially believed to be of pure spotted schools. In its briefs to the administrative law judge. NMFS recognized this fact and said enforcement actions would recognize the possibility of good faith errors.

Intent—scienter—is an element to be considered in determining whether to apply the civil and criminal penalties of any statute, including this one, absent specific language to the contrary. If observers and captains make infrequent and ultimately insignificant errors in failing to identify eastern spinners travelling with other species, and set upon them accidentally, the NMFS has already gone on record as saying it will be understanding, providing every effort is subsequently made to permit the mammals to escape alive.

Indicia of good faith error will be the frequency, number, and magnitude of such mistakes. The entire NMFS regulatory scheme is built upon good faith judgment of skippers—enforcement policy regarding the proscription on take of eastern spinners should be no different in this regard, requiring of skippers no more than is possible short of ceasing to set out on porpoise entirely.

We ourselves have recognized the impossibility of avoiding occasional mistakes by advocating unintentional accidental take of eastern spinners up to 6,500, specifically to take account of the 7-percent margin of possible error.

To permit intentional take of this depleted species, however, would not only be in violation of law, but would also, when combined with the inevitable unintentional take, result in a total kill far higher than what the special can absorb and still grow in population size with a virtual certainty, the NMFS—and act's—goal.

2. *The 59,000 total porpoise quota*

The industry alleges the total quota is below the level required for the fleet to operate profitably. However, assuming no porpoise taking until April, the quota is set at an annual rate of 90,000, the high end of what the industry's own witnesses testified at the hearings they required.

Further, last year 20 boats equipped with the fine mesh net required for all boats this year had such low kill rates that if extrapolated across the fleet, less than 10,000 porpoise total would have been killed in 1976.

Not only will all boats be equipped this year with fine mesh nets, but use of new techniques—longer backdown periods guided by men in rubber rafts and face plates at the corkline assisting porpoises out of the net—will greatly reduce mortality, as illustrated by the results of the recent cruise of the *Elizabeth C.J.* Further, last year only a small fraction of the fleet's skippers and boats were responsible for a disproportionately large percentage of the kill. Industry self-policing for the common good by means of the "skippers' panel" has already dealt in the last few weeks with problems of inept or untrained skippers and ill equipped boats. Ridding the fleet of these Jonahs or solving their problems will significantly diminish mortality.

In short, the evidence clearly suggests that the industry can stay within its 59,000 quota.

3. *The economic effects of the regulations*

The industry alleges that the decision on 1977 regulations has required the fleet to return to port since it cannot operate under such terms profitably. However, much of the fleet would have been returning to port within the next few weeks anyway, albeit perhaps not so early, to gain eligibility for the "one free trip" into the CYRA as described above.

Speaking more generally, the American tuna fleet has long suffered serious economic problems completely unrelated to the porpoise question. The fleet is overcapitalized, with newer vessels heavily mortgaged and suffering inflated operating expenses, such as for fuel, not foreseen when they were constructed. Despite the fact that 1975 and 1976 were, measured by tons of tuna landed, the most successful fishing years in history for the U.S. fleet, the average boat lost money according to Government figures, covering variable but not fixed costs.

The U.S. fleet faces increased foreign competition—ironically much of it U.S. built, creweed, and subsidized—for a diminishing resource. The price of tuna has not substantially changed for 15 years, evidence of market saturation and/or buyer resistance and/or oversupply.

Employment in canneries have been diminishing measured by hours worked since 1973, when no porpoise quotas were in effect. Automation and largely nonunionized Puerto Rican labor have affected mainland U.S. canneries far more than any porpoise regulations.

In sort, the U.S. tuna industry is troubled financially, and is ripe for an economic shake out completely unrelated to the porpoise question. There is no reason to make the porpoise the scape goat for investor miscalculations in the industry.

4. *Taking of porpoise before April*

The industry complains that whatever the likely ultimate effect of NMFS Director's regulations, the fleet cannot gain any benefits from them for at least the 30 days prescribed by law before they go into effect. While this may be true, and I would like to make some comments about this after I finish the statement, it overlooks the fact that most of the fleet would have spent part of this period in port anyway waiting to qualify for the "free trip."

It also overlooks the fact that the question of interim relief is currently pending in the U.S. Court of Appeals for the District of Columbia, where the industry is being joined by NMFS and most of our environmental groups in its request that some porpoise fishing be permitted, to count toward the annual quota, prior to the 1977 regulations and permits taking effect.

While the interim relief requested still would not permit taking of spinner porpoise, it would permit setting on other species, thereby improving the industry's capability for the next 4 to 5 weeks. Offshore spotted porpoise, the species that "carries" the tuna and is primarily set upon, would be available.

There is no way of knowing when and what the court of appeals will rule, but it is entirely conceivable it will favor interim relief now that the administrative decision is final, and the jurisdictional squabble between it and the U.S. District Court for the Southern District of California-San Diego is settled.

In summary, neither environmentalists nor the industry are entirely happy with the NMFS decision, either its substance or timing. The difference is that we are prepared to accept the results in a spirit of compromise, whereas the industry's reaction continues to be one of truculent obduracy.

The Marine Mammal Protection Act was passed in 1972. Since that time the U.S. fleet has killed nearly 800,000 porpoise. Since 1974 when the industry became subject to the Act and the fleet's 2-year grace period expired, there has been little evidence of industry compliance with the act's "immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate."

NMFS annual mortality figures speak for themselves: 1974, 99,000; 1975, 135,000; 1976, 104,000 in 10 months, an annual rate of 130,000. Killing has plateaued at annual levels of over 100,000.

Five years after the act was passed NMFS has finally gotten serious about preventing this carnage. We are willing to curb our impatience with what we see as a continued 1977 go-slow Government policy on enforcing the zero kill goal of the act because we feel solutions, at least partial ones, are now at hand, and we do not wish either to hazard loss of progress to date or to cause the industry true economic hardship.

We do not understand why the industry cannot meet us halfway, rather than renewing its bellicose demands for legislative relief based upon exaggerated claims of economic ruination and practical infeasibility of implementation of the proposed regulations.

We would remind this committee of our testimony 2 weeks ago to which we adhere today—the act is finally working. To weaken or destroy by amendment a decisionmaking structure painfully worked out by trial and error over the last 5 years would be a tragic mistake, particularly since the elements in the 1977 regulations most complained of now by the industry are of concern at best for only a few more weeks, and need never recur.

I would like to supplement this testimony with comments on five areas that were discussed with the committee and Dr. White this morning. This section of my testimony will be ever so brief also.

There was discussion about the inevitable delay which allegedly will have to take place in implementing the final regulations because of court review and the 30-day comment period. It is our position, operating from common sense, that the court review is not likely to delay the implementation of these final regulations.

As I believe you pointed out, the ATA will file, I assume, for a general permit. Last year's permit was between 10 or 15 pages long. I don't see what the court could review about that.

The certificates of inclusion are a page or two long, and it is my interpretation that the court wants only to make sure these documents are filed. The court of appeals cannot seriously review such permit requests after the regulations have been filed, given the court's lack of expertise and busy schedule.

I would look for this to delay not at all the effectiveness of the 1977 regulations.

Second of all, also in line with the discussion of the chairman and other members of the committee this morning, it is our interpretation that the 30-day review period could be abbreviated or even eliminated entirely. We have a difference of agreement with the NMSF legal authorities on this subject, because they point out that the law specifically requires a 30-day comment period.

However, arguably, from our point of view, there has been more than a 30-day comment period on this permit, the application for which was initially filed last August or September. There have been hearings ad naseaum, administrative and oversight, and public comment periods on regulations of all types.

The chairman asked this morning if anyone in the room would have any comments during this 30-day period. The answer was no. It is difficult to conceive how any comments could raise significant new points during this period of time not already considered.

The actual intent of the act's comment period was not sterile formality; therefore, if it can be argued that the comment period has been running simultaneously with the adjudicative hearings and related briefing schedule, it strikes me as highly unlikely that a court would attempt to intervene and enjoin the implementation of the 1977 regulations at any time within the next 30 days.

That is my own legal interpretation, but it makes some common sense.

Mr. LEGGETT. Now, the law says that the Secretary shall publish a notice in the Federal Register of each application made for a permit under this section. Such notice shall invite the submission from interested parties within 30 days after the date of the notice or written data are viewed with respect to the taking or importation proposed in such application.

Mr. BUTLER. The industry submitted its request for a permit last August or September. Then a Federal Register notice was filed. It was one of the many opportunities all of us have had to comment on the subject in the interval. What I have suggested is at least a legal argument of sufficient merit so that NMFS should give it close attention.

What is the purpose of waiting 30 days to receive comments, when there will be no comments forthcoming?

Arguably, that requirement has already been met, and I would agree with the chairman, if I caught the drift of your comment this morning correctly, that perhaps the interpretation of the NMFS has been a little too conservative in this regard.

Another point that I wanted to make here is that in the discussion this morning of the act's definition of depletion, there was the distinction drawn between legal depletion under the act, particularly the criteria, and biological depletion. I thought I caught from the drift of comments on the part of some members of the committee that they felt biological depletion and the legal definition of depletion should be synchronized so as not to get caught in a situation as now where we now have a species which is legally but not biologically depleted.

My response is simply to ask what is biological depletion? If by biological depletion is meant threatened or endangered status, it was clearly the intent of this committee and Congress in passing this act to protect marine mammals before they reach threatened or endangered status.

I don't know how to respond that legal depletion and biological depletion should be the same until I know what is meant by biological depletion. No one has defined it.

The next point: the committee this morning reexamined with Dr. White, and more specifically with Dr. Fox, the population estimates for the various species in question. I am sure this committee knows that for many days of cross examination at the recent NMFS adjudicatory hearings, we took up not only the Government's population estimates, but the industry's population estimates, and we went back and forth through thousands of pages of transcripts and exhibits. Ultimately it was the finding of the administrative law judge, as well as NMFS Director Schoning, that the best evidence was the Government's evidence in this regard.

I really don't think much use can be served here by trying to relitigate the specifics of that 3-week cross examination.

Another point was, and I think, Mr. Chairman, that you went through this with Dr. White and Dr. Fox, how do you tell an Eastern Spinner from another porpoise? That was basically the question. And while it may not be as easy as telling a blond from a brunette, it isn't that difficult either, inasmuch as not only does the Eastern

Spinner spin while jumping, but it was distinctive markings, at least the adult has, and it has a forward cant to its dorsal fin, whereas other porpoises have a backward cant to the dorsal fin.

Furthermore, the geographical ranges of the White-Bellied Spinner and the Eastern Spinner, while they do overlap in the middle, are basically different. The population of Eastern Spinners is an in shore population geographically; whereas the White-Bellied Spinner is by and large offshore. It is true that immatures of the two species of spinners might conceivably be confused. We have taken that into consideration with the 7 percent error factor. But it is not true that an Eastern Spinner is a difficult species to identify.

I think that probably concludes the remarks that I wanted to make, except that I am sorry that Mr. McCloskey is gone, because I wanted to express our agreement with what I caught from the drift of his questions of Dr. White this morning was his conviction that 100 percent observers is ultimately something that is going to be required to solve this problem. We, too, do not understand why the industry cannot be made to pay for these observers and pass along the cost to that segment of the population which is most likely to benefit, which is to say, the consumers of tuna.

The industry is the economic mechanism best able to spread the cost to the proper element of society, those people who benefit from the taking. We aren't trying to saddle the industry with nonrecoverable expenses. There is a more rational way of spreading this cost across the society. I think that is all I have to say, unless you have some questions.

Mr. Leggett. I think your statements are very helpful, Bill. When does the CYRA area close? I guess when the quota is estimated to be taken?

Mr. Butler. Yes; and in recent years, it has been by and large in March. This year, in comparison with last year, the fleets taken as a whole are doing less well. There are apparently less fish available, at least judging by the evidence the industry gave 2 weeks ago. It is therefore likely that the CYRA quota will be declared closed the first week in April this year.

Boats that are in port at the time when the quota is declared closed, either the third or fourth week in March or the first week in April, are eligible for one more "free" trip in the CYRA if they choose to take it.

Mr. Leggett. Do they have to be in port for a full month?

Mr. Butler. No; but they have to be in port, as I understand it—there are people here far more informed than I am on this—they have to be in port only at the time it is declared. So therefore, I think it is somewhat of a guessing game, but an informed guessing game, to have your boats in or near ports so they can make a dash home to qualify for a free trip.

Mr. Leggett. In fairness, if it is not going to close until April, to allege that they are now in port for the free trip is probably a little overstated.

Mr. Butler. I said, "albeit a few weeks earlier." But they were coming in anyway. To estimate that this 4- or 5-week period of fishing was lost is not accurate. Some of the period of time has to be spent in port. In the past those wishing to qualify for a "free" trip have been a significant portion of the fleet. I don't wish to overstate the point.

Mr. LEGGETT. I think your statements on eastern spinners are helpful; also your statements on the problem with the industry, and the fact that if the kill rate of the 20 boats with fine mesh net were extrapolated across the fleet, that they would have a very fine record, which is true. I think that maybe at this point I have no more questions.

Mr. BUTLER. I would like to point out again to the chairman that yesterday and today there were filed with the U. S. court of appeals additional papers by the Government and the industry asking that some taking of porpoise be permitted before the 1977 regulations became final. Griffin Bell has himself signed the Government's submission to the court. We are supporting that effort by the Government and the industry to get an interim regime, or in other words, on porpoise fishing started as soon as is possible. I want that to be clearly understood because it is a compromise position which is causing us a great deal of anguish, but one to which we firmly adhere.

Mr. LEGGETT. All right.

Mr. BUTLER. It is wrong, as some people have made the sweeping indictment, that evironmentalists are trying to keep the tuna industry from fishing at all because of the porpoises. It just isn't so.

Mr. LEGGETT. Now, the Government agreed with the calculations I made that the prohibition on setting on eastern spinners would probably preclude on the average only about 10 percent of the bluefin, skipjack, and yellowfin sets with and without porpoise that are made. Do you agree?

Mr. BUTLER. As I understand it, that is correct. The statement that was made by Dr. Fox was that 20 percent of yellowfin tuna taken on porpoise are taken on mixed schools with eastern spinners. Of course, a lot of tuna is not taken on porpoise at all, so that gets the figure down to the 10 percent you mentioned. That would be my best understanding, but I am relying on Government figures for that.

Mr. LEGGETT. All right. Mr. Rogers?

Mr. ROGERS. I am just wondering if you have 100-percent observers on all vessels, which I understand you think would be a good idea, who should pay for it?

Mr. BUTLER. I think the industry. I don't know if you were here when I testified to that. I would agree with Mr. McCloskey that I think the industry should pay for that, but not get caught with the ultimate cost.

In other words, they should pass it on to the consumer. It is the consumer of tuna who is ultimately benefitting by the industry being able to fish on porpoise, and also by the industry being able to fish in compliance with the law.

It is our understanding of the industry's economics that this would not raise the price of tunafish per can by any substantial amount; neither would it cause the industry, therefore, great financial pain. They could and would pass this cost through to the consumer.

While I recognize a can of tuna undoubtedly has a price beyond which buyer resistance sets in, in other words, the demand curve is a flexible one and price dependent, nonetheless, the amount of additional cost for canned tunafish which would be attributable to the cost for observers would be miniscule when compared with all the many factors which go into the cost of a can of tunafish.

I think ultimately the consumer should pay and not the Government or industry—the consumer of tunafish should pay because he is the one who is ultimately benefitted.

Mr. ROGERS. Thank you.

Mr. LEGGETT. Thank you, Mr. Rogers.

Mr. Forsythe?

Mr. FORSYTHE. Thank you, Mr. Chairman.

Thank you, Mr. Butler. Your testimony has been helpful. I would really like to go to one point. It is a point which bothers me, as we try to find a way to come out of a morass of problems. and this is on page two, under your item 2: you said that you believe that the optimum sustainable population to be the pre-exploitation population levels themselves.

Mr. BUTLER. We have chosen to maintain that as our theoretical, legal, and scientific optimal position. However, since the NMFS adjudicatory hearings have commenced, we have talked in terms of the Government's definition of OSP as a 50-70% range of preexploitation populations, without necessarily conceding our theoretical view. We are talking the same terms as the government in terms of optimum sustainable population constituting a range of preexploitation population, so we hope you will permit us the facesaving device of suggesting there is a difference between what one theoretically believes and what one practically has to deal with. I suppose this committee itself faces such ideological compromises all the time.

Mr. FORSYTHE. Thank you, Mr. Butler, you have shown a very reasonable attitude to find a way to keep this from being disastrous to an industry, and to a food supply which I think is important. For that I compliment you.

The problem is ultimately for the committee.

Mr. LEGGETT. Mr. Anderson.

Mr. ANDERSON. Could you define a little bit more the eastern spinner porpoise as being relatively close to shore or in shore? What do you mean by that in miles?

Mr. BUTLER. I am sorry, I did not bring the relevant report with me. The Southwest Fisheries Service has a report, the last pages of which show the geographical depictions on the map of where these populations exist: where the eastern spinner exists, where the offshore spotted exists, and where the white bellied spinner exists.

In fact, some unbeknownst benefactor or benefactoress has just put copies of these maps in my hands, and with your permission, I will approach you and show you what I mean.

Mr. ANDERSON. In miles. Can you tell us, in shore, is a mile? Ten miles? Thirty miles?

Mr. BUTLER. I am not competent to make those judgments at this moment, judging by the scale on the map that I have.

Mr. ANDERSON. The way you word it is that this is very easy to see and all you have to do is look at it.

Mr. LEGGETT. Why don't you show the graph to the Chair and let me interpret it.

Mr. ANDERSON. Your statement makes it very simple to determine, one group is in shore, and you go out a few miles and the other group is beyond that. That is not it at all from what I see of the graph.

Mr. BUTLER. I meant to suggest that there is some overlap. Perhaps the chairman could describe it.

Mr. LEGGETT. Let the record show that Mr. Butler has presented a chart which shows the concentration of Eastern Spinners in the area which appears to be roughly 300 miles off the coast of the tip of Baja, Calif., and traveling, then, generally parallel to El Salvador, Costa Rica, Nicaragua and Panama, and terminating somewhere down near Peru.

There also appears to be a gray area about the same band which I suspect is a hybridized area with the white belly.

Mr. BUTLER. Although I am not completely certain, I think there is an overlap of the populations, but that the populations themselves are largely distinct, and not hybridized.

There may be some actual crossbreeding of them. I defer to Dr. Fox on that subject.

Mr. LEGGETT. All right.

Mr. BUTLER. Also on those charts is a map of where the CYRA is, and it is all done in degrees of latitude and longitude.

Mr. ANDERSON. Your language was misleading. Was your answer that in shore was 300 miles?

Mr. LEGGETT. Approximately.

Mr. ANDERSON. Three hundred miles to me is not in shore. It is a long ways out. It is misleading, very misleading.

Mr. BUTLER. What I meant was that it was primarily within the CYRA so that when the boats do fish outside the CYRA, as they do for the latter half of the fishing year, beginning in May and for some time in June, outside the CYRA, the porpoises they will be running into are Offshore Spotted and the White Bellied Spinner, as opposed to the Eastern Spinner.

Mr. ANDERSON. The way you read the paragraph, you go out a little way and you have the Eastern Spinner, and you will have to go out a little further and you will hit a White Belly. It is more complicated than that.

Mr. BUTLER. Yes, it is. I didn't intend to give the impression that it was that simple.

Nonetheless, the basic truth of my observation remains as illustrated by the charts.

I would ask that the charts be included in the record after my testimony. It is an official portion of an official government report. It graphically makes the point that I have been trying to make verbally.

Mr. LEGGETT. You want your chart in the record?

Mr. BUTLER. I would like the chart in the record.

Mr. LEGGETT. The chart is in the record.

Mr. ROGERS. Without objection of the Members.

Mr. LEGGETT. By unanimous consent, the chart is in the record.

Mr. ROGERS. Thank you.

[The following was received for the record:]

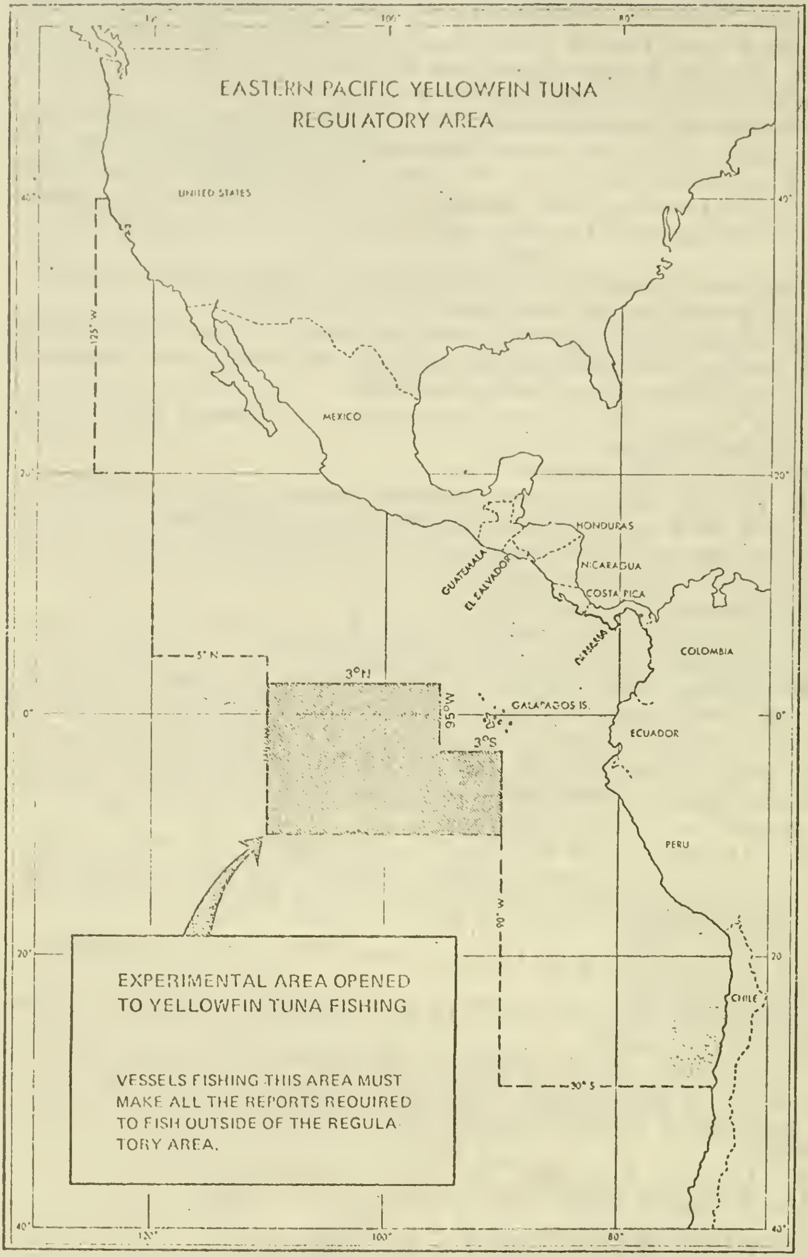

EASTERN PACIFIC YELLOWFIN TUNA
REGULATORY AREA
UNITED STATES
MEXICO
HONDURAS
NICARAGUA
GUATEMALA
EL SALVADOR
COSTA RICA
PANAMA
COLOMBIA
GALAPAGOS IS.
ECUADOR
PERU
CHILE
125° W
5° N
3°N
95°W
3°S
90° W
30° S
120°
100°
80°
40°
20°
0°
EXPERIMENTAL AREA OPENED
TO YELLOWFIN TUNA FISHING
VESSELS FISHING THIS AREA MUST
MAKE ALL THE REPORTS REQUIRED
TO FISH OUTSIDE OF THE REGULATORY AREA.

Figure 4

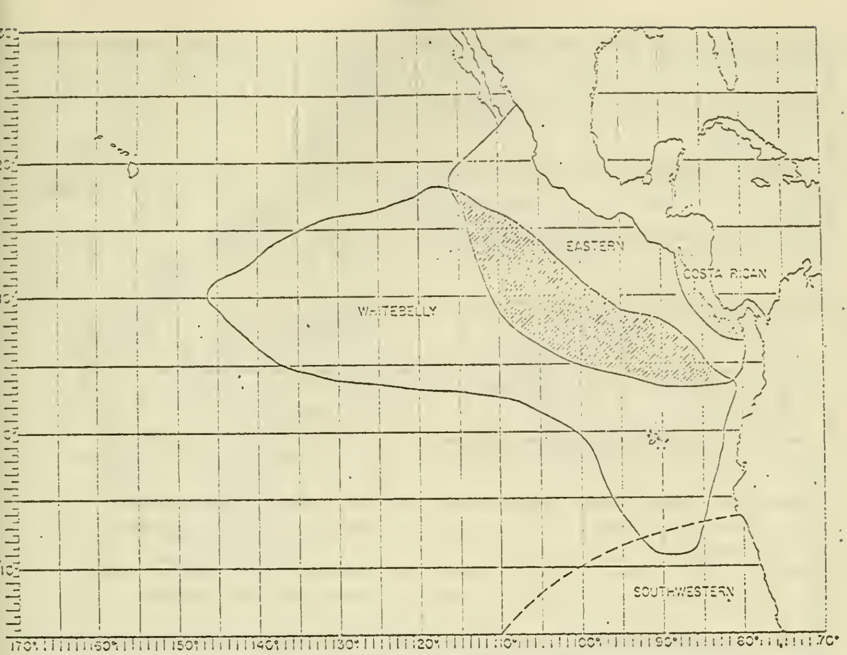

30
20
10
10
EASTERN
COSTA RICAN
WHITEBELLY
SOUTHWESTERN
170°
160°
150°
140°
130°
120°
110°
100°
90°
80°
70°

Figure 4. Expanded geographical distributions of spinner dolphin stocks in the eastern tropical Pacific including 1974-1976 sighting records

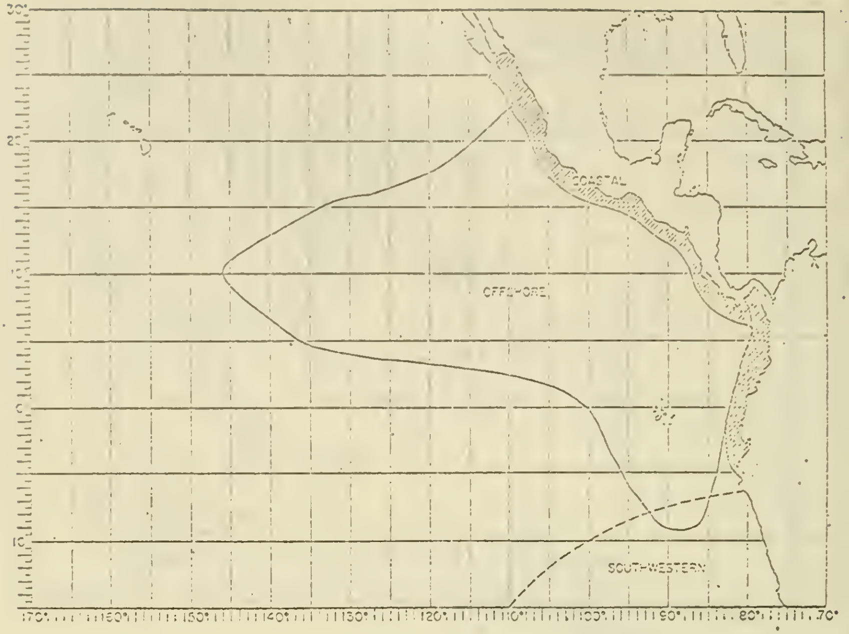

30°
COASTAL
OFFSHORE
SOUTHWESTERN
170°
160°
150°
140°
130°
120°
110°
100°
90°
80°
70°

Figure 2. Expanded geographical distributions of spotted dolphin stocks in the eastern tropical Pacific including 1974-1976 sighting records

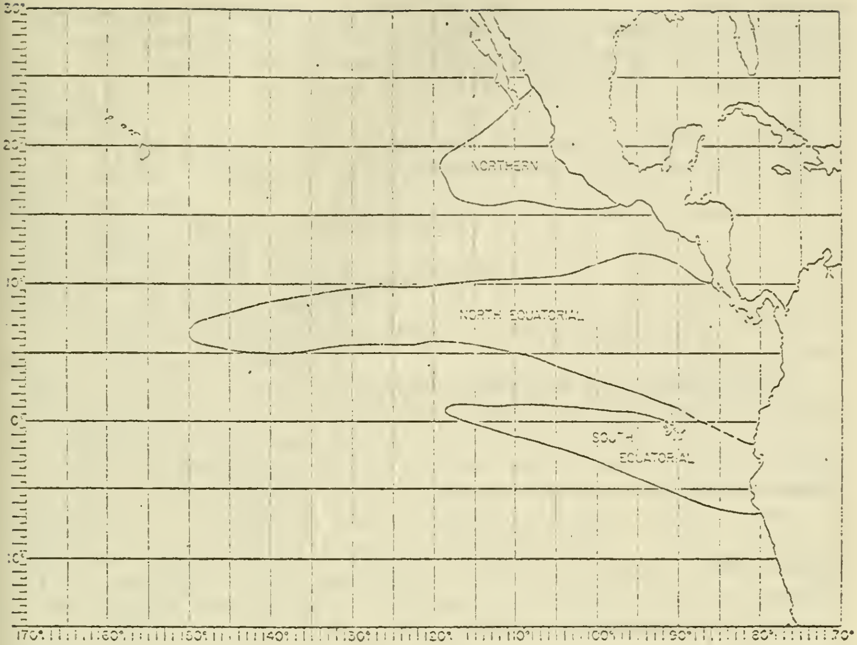

NORTHERN
NORTH EQUATORIAL
SOUTH EQUATORIAL
170°
160°
150°
140°
130°
120°
110°
100°
90°
80°
70°

Figure 6. Tentative estimates of geographical distributions of striped dolphin stocks in the eastern tropical Pacific

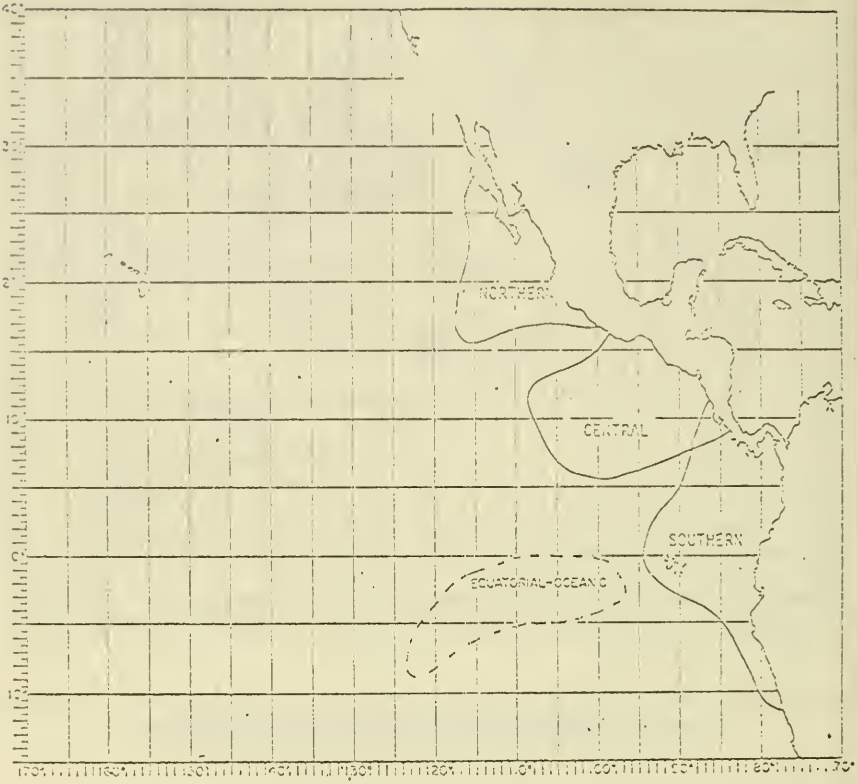

NORTHERN
CENTRAL
SOUTHERN
EQUATORIAL-OCEANIC
170°
160°
150°
140°
130°
120°
110°
100°
90°
80°
70°

Figure 5. Geographical distributions of common dolphin stocks in the eastern tropical Pacific (PSA/15)

Mr. LEGGETT. All right. Colonel Kaufman.

Colonel KAUFMAN. I will be very brief. I am president of Monitor, Inc. I am speaking for the same groups as Bill Butler with the exception that I just represent those that are a part of my line of consulting.

One reason I felt it very important to join Mr. Butler is that I appear on the witness list as a representative of the American Tugboat Association.

Mr. ROGERS. May I ask a question?

Mr. LEGGETT. Yes.

Mr. ROGERS. Have you been an observer?

Colonel KAUFMAN. No, sir.

Mr. LEGGETT. You are categorized in the wrong group. However, we have not been misled.

Mr. BUTLER. It was an accidental instead of an incidental take.

Colonel KAUFMAN. I would like to identify with the excellent testimony William Butler has given.

I have a few quick points. The first one relates to a very cogent argument for attempting to solve this problem by amendments to the regulations, or possibly some clarifying letters, rather than by amending the Marine Mammal Protection Act.

This argument, which has not been made adequately today, relates to the pressing need to get on with getting the other nations that fish in the CYRA involved in protective measures for porpoise conservation.

Before the 1st of July there is to be a special meeting to consider an international porpoise conservation program. If we go to that meeting having amended the Marine Mammal Protection Act as it affects the tuna-porpoise controversy when, for the first time, we are beginning to make progress toward having the industry and the government take enforcement of this act very seriously, it obviously is going to weaken greatly the hands of the U. S. delegation in an attempt to get the foreigners to take the problem seriously.

It also will have implications in the very sensitive negotiations that will be underway within the IATTC.

The other point I would like to make, Mr. Chairman, relates to the fact that rather than avoiding the protective porpoise provisions of the act, we should again urge the industry and the government to develop on a quick-fix basis, an ability to abort problem sets. We have talked about that in very forum in which we have talked about the tuna-porpoise problem.

Mr. LEGGETT. We solve that by getting an observer on each boat.

Colonel KAUFMAN. It certainly would help, and we strongly support that. However, the point I am making is that only when we have an observer on every boat will we be able to have quotas on individual species that are enforceable. And when it is found that proscribed animals are within the net, it is very important that the regulations require that the set be aborted to avoid killing those animals, to avoid, in effect, breaking the law.

Mr. LEGGETT. That is in the regulations.

Colonel KAUFMAN. I am just saying that this is a capability that the skippers ought to have that they don't have now except on a very brief portion of the whole cycle of setting on porpoise.

Mr. LEGGETT. Did you request that the regulation include that provision?

Colonel KAUFMAN. We have testified on that, sir, many times.

Mr. LEGGETT. All right.

Colonel KAUFMAN. We talked to the industry in Seattle and here in Washington.

Thank you, sir.

Mr. LEGGETT. All right, thank you very much.

Now, I think at this point, it might be helpful to have the position of the industry, and if all the industry people, including the labor representatives, Mr. Royal, Mr. Felando, Mr. Mulligan, Mr. Lindsey—he may have had to go—Mr. Drozak, the Seafarers Union, if all of you could approach the witness table at this point, I would appreciate it.

All right, let me see, from right to left: Mr. Mulligan, Mr. Royal, Mr. Alverson, Mr. Drozak, Mr. Felando, and Captain Madina.

Jack Lindsey indicated he couldn't stay, and I gave him leave to file a statement. He wanted to make a statement on consumer implications of what we are doing here today.

So, gentlemen, do you have any prepared statements? Mr. Drozak does, and your statement will appear perhaps first in the record at this point. You can select among yourselves who would care to talk first.

[The following was submitted for the record:]

STATEMENT OF FRANK DROZAK, EXECUTIVE VICE PRESIDENT, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

Mr. Chairman, the Seafarers International Union of North America, AFL-CIO, appreciates the opportunity to present its views on the need to amend the Marine Mammal Protection Act. The Seafarers International Union, through its affiliates, the Fishermen's Union of America and the United Cannery and Industrial Workers of the Pacific, represents the great majority of American fishermen and cannery workers involved in the U.S. tuna industry.

I have seated with me Steve Edney, who is president of the United Cannery Union as well as chairman of the Fish and Cannery Conference of the SIU.

We are deeply concerned over the adverse impact the Marine Mammal Protection Act has had on the U.S. tuna industry and its workers. We believe that neither the Congresss nor our industry foresaw the havoc this law has created nor the roadblocks it has placed in the way of effective tuna fishing operations.

This chaotic situation has climaxed in recent days in the U.S. tuna fleet returning to port because it cannot fish economically and our domestic canneries facing uncertainties over how long stocks of tuna will be available.

The Seafarers Union believes that unless this law is amended to provide for rational regulation of the tuna industry, U.S. tuna vessels and canneries may be forced out of the United States. In the process we would lose an important food industry and the thousands of jobs it produces at sea and on shore.

I think the record is clear that only U.S. fishermen have engaged in porpoise rescue efforts designed to meet the act's requirements. In many cases, U.S. fishermen have engaged in hazardous attempts to save porpoise caught in the nets. Foreign boats make no such efforts to save porpoise, and today the entire foreign fleet is at sea taking tuna by methods which the U.S. fleet is prohibited from using.

We believe that the evidence overwhelmingly points up the need for this committee and the Congress to act on a priority basis to amend the act. Each day we delay, the economic and employment losses in the tuna industry grow.

It should be clear to all that by forcing the U.S. tuna fleet into port, the Marine Mammal Act has attained exactly the opposite goal it was designed to achieve. It has caused a virtual absence of regulation of tuna fishing operations, as the only vessels left at sea are outside the control of the act.

The Seafarers Union and its affiliated fishermen and cannery affiliates urge this committee to amend the act to allow economical U.S. tuna fishing operations and an end to cumbersome Federal regulations and continual court battles. In the process the committee will help preserve a vital U.S. food industry and the jobs it generates for thousands of Americans.

Thank you.

STATEMENTS OF FRANK DROZAK, EXECUTIVE VICE PRESIDENT OF SEAFARERS INTERNATIONAL UNION; FRANKLIN G. ALVERSON, RESEARCH DIRECTOR, PORPOISE RESCUE FOUNDATION; JOHN ROYAL, SECRETARY OF FISHERMEN'S LOCAL NO. 33, INTERNATIONAL LONGSHOREMEN AND WAREHOUSEMEN'S UNION; AND AUGUST FELANDO, EXECUTIVE DIRECTOR, AMERICAN TUNABOAT ASSOCIATION, ACCOMPANIED BY CAPT. JOSEPH MEDINA; AND JOHN MULLIGAN, EXECUTIVE DIRECTOR OF THE TUNA RESEARCH FOUNDATION

Mr. Drozak. If it is satisfactory with the rest, I will proceed.

Mr. Leggett. Your statement will appear in the record as though read in full.

Mr. Drozak. Yes; but I want to make some comments first.

Mr. Leggett. Very good.

Mr. Drozak. First, I want to thank the chairman for allowing the Seafarers to participate today at this hearing.

Second, I would like the Chair and the committee to know that the AFL-CIO and the Maritime Trades Department combined represent some 14 million workers who are very much concerned with the impact of the loss of jobs relative due to the effects of the Marine Mammal Protection Act.

Not only that, but they are concerned about the impact that it will have in some of the cities where the workers have established homes and live and work. We are very much concerned with that.

And number two, we are concerned as to the law itself and its implementation relative to the American fishermen when there is no such requirement for the foreign fleet to avoid damaging or destroying the porpoises. We just feel that this situation is not fair. Whether or not there is an American fleet fishing, tuna will be caught by foreign fleets. In view of this inequitable situation there is a threat of transfers to foreign flags by U.S. tuna vessels.

These are some of our concerns.

I am also concerned, Mr. Chairman, relative to the observers and who is to pay for them.

I heard this morning, earlier, Congressman McCloskey said that it should be industry, that it should not be Government. We believe however that observers are not needed and that if employed should be paid for by the Government.

I heard this afternoon other statements——

Mr. Leggett. I do not really want to get into that.

It is my view that this is a matter of actually—well, what I would like to get into is a system whereby license fees, tuna industry pays, foreign countries would be paid, in fact, by the fees that we get from the Russians and the others, picking up the $25 million to the 200-mile limit, and we are well aware of the fact that it hurts some and it helps others.

I think those funds ought to be used inevitably to balance out some of the inequities.

I am not really too much of a mind to load down these license fees.

Mr. Drozak. I appreciate that comment.

I would just like to close of in saying that we definitely appreciate your concern and the committee's concern, in holding these hearings, and we certainly hope all the committee would move to support amendments to this law as soon as possible to give us all some relief that would be fair to all parties, taking into consideration those who will oppose the rules and regulations, those who would hope that we can make some changes that would at least keep our people working and not destroy that life that so many of us enjoy.

With that, Mr. Chairman, thank you.

Mr. Leggett. Thank you very much.

Very helpful.

Mr. Royal, do you want to speak at this point?

Mr. Royal. That will be fine, Mr. Chairman.

I do not have a prepared statement.

My name is John Royal, and I am the executive officer of the Fishermen's Allied Workers' Union in San Diego, Calif.

It is affiliated with the International Longshoremen and Warehousemen's Union.

Amplifying what I submitted in the past week's statement, I am at a total loss to know what to say before this committee and having been before the committee some 20 years now, and having survived everything that has been thrown at us since World War II, the Peruvian tuna war, the Japanese tuna war, and so on.

In spite of our Government we have survived.

Now, it looks like through the hands of our Government we are going to be put under now.

We hope not.

The people that I represent and hopefully speaking for here today, the American tuna fishermen, I think really is an endangered species in this whole ballgame we are talking about.

We find ourselves in a real difficult situation where we do not know from day to day where we are really at, where we stand, and who to look to for proper guidance, direction and relief, between the agencies of Government and others.

Our people have lost an awful lot of money.

A lot of jobs have gone down the drain. I think if something is not done very shortly, I think we are going to see more American fishermen being put out of work.

I was in San Francisco last Wednesday when the ninth circuit of appeals was holding hearings.

At that time I took the opportunity with Mr. Harry Bridges, our international president, and explained to him what our problem was.

He was aware of it and expressed very grave concern.

I thought he would be here today.

However, he is in New York.

I hope to get him back here next week. He indicated he was going to be talking with his counterparts on the east coast and elsewhere and see what they could do on an international level to coordinate some program by labor to protect the American jobs that are in jeopardy right now.

I find it very difficult, Mr. Chairman and members of the committee, to sit here and hear some people talk and treat the industry and treat our jobs and our livelihood with such a cavalier type of attitude, like it is not really that important.

It is not important maybe to some people, but to those people that it is their livelihood, it is very, very important.

These people are not going to be easily retrainable or find employment elsewhere.

It is a father-son tradition.

I think our Government in all honesty owes us something.

We have been slammed around now like I said earlier, since the end of World War II.

We have got very little assistance from our Government and a lot of people. We have been used, I think, as a scapegoat. We led the first juridicial U.S. position on the Law of the Seas, the 200-mile war, and we took the brunt of that.

We did not get the support we should have gotten.

I only cite this to say somewhere down the line it is our turn. We should have our day in court somewhere or somebody is going to say, this industry, we think, has had enough.

Let us let them breathe a little bit, let's let them work.

We are not out to put the porpoise out of business and kill the porpoise. We do not disagree wholeheartedly with what environmentalists have said to us.

We have met with these people and worked with them. I am very pleased with the track record up to now.

I am very impressed, in fact.

I know what the industry has done in cooperating with the environmentalists, with the Government agencies, with Congress and the intent of the act.

I think if common sense can prevail here, and people can keep their heads cool and get the emotion out of it and continue on the way we are going, I think we are going to finally get to that plateau where it is going to satisfy environmentalists, protectionists and the tuna industry, to where we are protecting porpoise stocks and at the same time we can survive as an industry and continue to work and make a livelihood.

As I said in the past, you cannot turn 200 years of ills around in 200 days.

It is impossible.

Once you recognize the problem and you stop it and you reverse the trend, and you move in the right direction, then I think people show more consideration.

I was very disturbed today sitting in the audience, and I probably would not have been as calm 10 years ago, to sit there and have learned people say that fishermen are liars——

Mr. LEGGETT. We are not going to get into that.

Mr. ROYAL. We are not?

Mr. LEGGETT. I stipulated that we would avoid personal issues.

Mr. ROYAL. Who stipulated as to what? I did not get that.

Mr. LEGGETT. I said, we agreed, I agreed, that we do not need any evidence to refute what has been said.

We can spend all day here talking about that.

Mr. ROYAL. I get your point.

I think with the jobs that are at stake, I think that the industry is not going to lay down very easy.

Mr. LEGGETT. I appreciate that.

If this committee has anything to say about it, the industry is not going to lay down either. It is going to remain healthy.

Mr. ROYAL. When we were attacked in 1941, it was the tuna boats and the tuna captains that gave the United States its eyes and ears of defense—it was not the porpoise.

Mr. LEGGETT. Exactly.

There is no doubt about it.

Without Mr. Studds here, I will state that the most effective and efficient part of the American fishing fleet is the tuna fleet.

We are very proud of the work that the tuna fleet does.

Who wants to speak next?

Mr. FELANDO. Thank you, Mr. Chairman.

I am August Felando, General Manager of the American Tunaboat Association, San Diego, Calif.

Members of our Association are the owners of the tuna vessels.

Many of the owners are skipper operators, for instance, like Captain Joe Medina, to my right.

Mr. LEGGETT. One of the great pioneers in saving porpoise, I might say.

I will also state this, that the progress that has been made in saving porpoise has, in large part, been made by the industry, albeit with some nudging from some environmentalists.

Mr. FELANDO. It is really the objective we have, the objective of any fisherman right now, believe it, and has been in my opinion, to have a zero mortality on porpoise.

The fact is, that you are more efficient, more effective a fisherman when you use the porpoise not only as hunting dogs to find fish, but if you release them out of the net alive, you can make that one more set that will get you home faster.

That is the economic motivation that sometimes I think most people forget.

Plus the fact that without the porpoise, we would not be in business today, we would not be able to adjust to the seizure problem.

We would not be able to adjust to the conservation program in the Eastern Pacific.

That is because contrary to the information that was contained in Mr. Butler's statement, the traditional fishing area within 150 miles, 200 miles, off the coast, association of porpoise roughly 40 percent—40 percent of the time you are going to find yellowfin with porpoise.

From that point to the rest of the CYRA, going out another thousand miles, the association jumps up to 85 percent; 85 percent of the time you have to use porpoise to catch tuna.

Outside the CYRA, Mr. Butler is saying, 95 percent of the time, although the Director of the Investigations for the Inter-American Tropical Tuna Commission said it is closer to 99 percent.

So our survival, economic survival, is based on our ability to live with porpoise, not kill them.

Mr. LEGGETT. Do you have any information how long it takes a released group of porpoise to group up again with yellowfin?

Have you ever set on a group of porpoise that has not yet had an opportunity to meld with a group of yellowfin?

Mr. FELANDO. There is a lot of statistical information on that that occurred on a scientific cruise in 1971 that involved Captain Medina and his vessel, the *Queen Mary*.

We used a radio pack at that time to follow porpoise. We placed a radio pack transmitter on the porpoise, and followed the porpoise overnight.

Joe, do you want to comment on that and give an answer?

Mr. MEDINA. My name is Joe Medina.

We made a scientific research trip in 1971 following a school for 5 days and set on each day, and one problem we had, the school kept getting larger every day with mostly spinners. It was a mixed school.

We took an observer again the next trip and we found a real good school, large school, good fish on it. We made a set at dark, about 5 p.m.

Mr. LEGGETT. You did not send them to the same school?

Mr. MEDINA. Yes.

Mr. LEGGETT. Did you get fish?

Mr. MEDINA. We got little fish every day.

Next trip we used it, we found a good school, we set late in the afternoon, say about 5 o'clock, and got about 130 tons out of that school.

We followed the school that night.

The next morning we were right on top of the school, we set at 8 o'clock in the morning and got 130 tons again out of the same school, which gives you an example how fast they pick up fish.

Mr. FELANDO. One of our recommendations that has not been accepted yet. We feel with this radio pack we would be making fewer sets on porpoise.

Because I think somebody in the agency expressed alarm about the fact that we have these radio packs, we do not cause any damage to the porpoise, they refused to allow the industry to use that device.

Mr. LEGGETT. Very interesting.

Mr. FELANDO. I am reminded of the old theory, when you do not have the facts, attack the man.

I am very much concerned about what happened this morning.

Let me say this, Mr. Chairman; I will make a very short statement.

The whole basis for the yellowfin tuna conservation program has been based on the logbook entries of the fishermen. That has been going on since 1950.

The fishermen at administrative law judge hearing, and there were many of them, I think there were over 20 witnesses and more available, they went on oath and they were subjected to cross-examination in the very areas that we are discussing about mixed schools, spinners.

I think that the remarks that were made this morning, I think a public apology is required——

Mr. LEGGETT. The fact remains that when we calculate the amount of porpoise taken per year, we do not go around and get all logbooks and add the numbers. We do extrapolate the greater incidence in the observer data and this has been going on for a large number of years.

Your industry is not subjected to that.

So, as a practical matter, I think the question is a relatively moot——

Mr. FELANDO. The fact is, industry knows, and I think everyone knows, that it is the Government data that is relied upon.

Let me go to something else.

Mr. LEGGETT. As long as we understand that, nobody is being misled by any figures or anything else.

Mr. FELANDO. I want to talk about the status or the fleet now.

The season started on January 1, the fleet has to compete with the vessels of 11 or 12 other countries on a first-come-first-serve basis with respect to the take of yellowfin.

I am just using the figures now of the members of the American Tunaboat Association for 101 vessels out of 138 to 140 are really involved.

Based on our figures, the capacity of this fleet that was out at sea or roughly 77 vessels out at sea at the time, if they all came in with a full load of fish, they would have 68,765 tons of fish.

These vessels are entering the ports of San Diego principally, and Puerto Rico, and San Pedro, and the amount of fish they have on board is about 23,045 tons, the total amount of fish.

I want to go into that——

Mr. LEGGETT. As of what date is that?

Mr. FELANDO. As of Tuesday afternoon.

Mr. LEGGETT. March 1, 23,045 tons delivered at all three ports?

Mr. FELANDO. I made this computation on the basis of a running log that we have made, we have at the association.

What I am saying is that our vessels have roughly a little better than one-third of their capacity with fish aboard.

Mr. LEGGETT. Does that include less than 400 tons, too?

Mr. FELANDO. Every one.

Mr. LEGGETT. Every one?

Mr. FELANDO. Every one in this fleet, and includes vessels of less than 400 tons.

Mr. LEGGETT. All of these 140 ships, though, are over 400 tons, are they not?

Mr. FELANDO. No.

Mr. LEGGETT. Some are not?

Mr. FELANDO. There are about 113 vessels, and—of the 140, of that, well, are over 400 tons capacity.

Mr. Chairman, I want to repeat, this represents our fleet. In fact, we think other vessels or nonmembers are doing worse.

Mr. LEGGETT. Worse?

Mr. FELANDO. That is right.

We had 61 vessels that departed in January 1977.

They are coming back with about 35 percent of their capacity filled with fish.

The vessels that left before January 15 have about 38 percent of capacity filled with tuna.

Those that left after January 15 have about 25 percent capacity filled with tuna.

We have 10 departures in February, about a capacity of 7,730 tons. That group of 10 vessels have 145 tons of fish aboard.

We had three vessels that departed in October, 1976, and about 59 percent of their capacity is filled.

We have three vessels that left in December. They have about 51 percent of their capacity filled.

The fleet is coming in because they cannot make it, they cannot fish under the conditions that have been established by the courts, by the courts or anyone else since January 1.

They went out and tried. They cannot do it.

Mr. Leggett. Do you have any information on the foreign take during the same period?

Mr. Felando. No; except that we know that based on our intelligence, that vessels of the same type are coming home loaded, in other words, 1,200 tonners, we know of three vessels, Panamanian flag vessels, that were built in 1973, 1974, coming home loaded.

We know a vessel that was built in Spain about 1,700 ton capacity, within a relatively short period of time, going out to sea, picked up 900 tons, going into port only because of mechanical malfunctions.

We know that at the present time at least the total catch of February 28, there is 41,767 tons as reported catch of yellowfin up through February 28.

We are very much concerned about the fact that if the director of investigations for the Inter-American Tropical Tuna Commission makes a determination here that instead of using the available 210,000 tons, if he decides to use the 175,000 tons, maybe it may be for the reason that he knows that the U.S. fleet is concentrating on the smaller yellowfin and, in short, that he must accept the fact that during the closed season, roughly June through December, that he will have to compute in his computer about 45,000 to 50,000 tons, and then he knows that since we are in a season primarily involved with yellowfin, that the composition of the catch of the vessels by the entire international fleet, when they depart on their final open trip, after the closure date, will probably have a composition of catch 80 percent yellowfin and 20 percent other nonregulated tuna.

Therefore, we are looking at the possibility of 50 plus 80,000, and that is a very conservative figure, of 130,000, and now we are looking at a figure of 40,00 as of February 28, if he decides to go on 175,000 tons, rather than 210,000, the U.S. fleet will at the very most during the year 1977—well might have one full trip.

Most boats need at least two trips, at least two trips, and a 1,000 tonner or 1,200 tonner break even point is around 3,000 tons.

Mr. Leggett. If you have a 175,000 ton quota, when would you estimate the closure date would be?

Mr. Felando. I would estimate that he would have to be thinking around March 21.

Mr. LEGGETT. If he goes to 210?

Mr. FELANDO. If he goes to 210, I am thinking in view of the fact that the U.S. fleet has come in, that he should be thinking of a day around April 11.

Mr. LEGGETT. That is March 21 to April 11.

Now if the court determines to give the relief passed by Attorney General Bell over the past few days, and allows the tuna fleet to fish under existing regulations, what would you expect to happen?

Mr. FELANDO. I do not expect the boats to leave port.

The only thing I can refer you to is the decision of the administrative law judge, and the importance, economic importance, of the right to fish on mixed schools, and the difficulty of identification.

We can talk about percentages all you want. But there are averages.

There is a lot of misinformation that I think we can develop here in time through charts, I think, through Mr. Alverson, about the presence of eastern spinners.

These charts will indicate that they are not only on the inside, but they are on the outside, and more information is developing about their distribution on the outside.

I think there are some figures for 1976. We look upon 1977 as a year more closely related to the year 1972 when there was a very low skipjack catch, following very high skipjack year.

We think this year is following out that way.

If you look at the statistics with respect to porpoise sets during that year, you will find that 147,000 tons of yellowfin tuna were taken in association with porpoise that year, one of the higher years on record.

Necessarily, we think we are faced with the year where therefore the percentage of mixed schools will be higher and reliance, therefore, on mixed schools will be higher.

The fact is that this fleet cannot live without the administrative law judge recommendations of 6,500 quota for spinners and at least 17,000 white belly spinners; that was also the proposal of the administrative law judge.

I would like at this time on this point, the importance of it, to make a comment.

I would like with all due respect to counsel that were involved in the administrative law judge hearing, that fishermen were available in San Diego. They did testify extensively on this point.

If you read the administrative law judge decision, he spends a great deal of time in this area.

He recognized the economic importance of setting on mixed schools and with reference to spinners, eastern and white belly.

I would like to handle this question in two ways:

One, so at least you would know what we are talking about, oceanwise, of the distribution of eastern spinners, and that can be handled by Dr. Alverson in a rather easy way.

We have some charts here that I think will provide you some information visually on what we are talking about.

I would like Captain Joe Medina to talk briefly about the importance of mixed school fishing to the fleet of the attitude of the fishermen right now, the fact that they really put their full effort in San Diego to try to explain this rather complex problem to the administrative law judge and to the attorneys who had the opportunity to cross-examine them.

And for Captain Medina to emphasize, I guess, the importance of the eastern spinner involved in the mixed school fishing.

Mr. LEGGETT. So we can keep these issues relatively in line, we have had testimony concerning the observer program.

I presume industry does not like it.

But that would not be the thing that would preclude you from going out.

We have had testimony on the numbers of 59,000 that had been prescribed.

I suspect that would not be something that would preclude you from going out?

Mr. FELANDO. Yes; it would.

We told you we have to have an increase.

We have to have an increase in white belly spinners from 7,840 to 17,000.

We have to have an increase from 0 to 6,500. To me, it is amazing, it is ridiculous, when we all recognize in this room that the National Marine Fishery Service expects the foreign fishermen to take 9,400 eastern spinners, but the U.S. fishermen take 0.

In addition, 43,000 spotters is a marginal point with us.

The best information we can get from our consultants is that 50,000 is a minimum.

That is a tremendous challenge. We are willing to accept that.

So I want to make it very clear on the record, 59,050 is not acceptable to us.

Mr. LEGGETT. You are not satisfied with the numbers or with the——

Mr. FELANDO. Or with the finding——

Mr. LEGGETT. Actually, what you think you need, 59,000 plus 17, plus 65, is that correct?

Mr. FELANDO. 17,000 as recommended by the administrative law judge, with respect to white belly spinners. 6,500 or so with respect to the eastern spinners. And my consultants tell me that the 43,000 level for the spotters is a high risk situation, and that the administrative law judge recommended 65,000 spotters. And at 50 we would be taking a risk, but not as great a risk at the 43,000.

Mr. LEGGETT. Actually, what you are asking for is 7,000 more spotters, is that right?

Mr. FELANDO. My consultants say, I will let Frank explain this, he thinks the fleet would be taking a tremendous risk at that level.

Mr. LEGGETT. When you add 59, and 17 and 65, that is 82,000, and add 7,000 more to that, that is 89,000.

Mr. FELANDO. I will repeat the figures again.

We are just dealing with three types.

The key element is the 6,500 eastern spinners.

Seventeen thousand white belly spinners, and that takes care of the mixed school situation.

With respect to the spotters, which the administrative law judge made a recommendation, I think, of 65,000, based on the scientific personnel of the National Marine Fisheries Service, as I understand it, the final rates come out with a figure of 43,000.

My information is that we cannot live with that.

That risk declines as we move toward the 65,000 figure.

I think Frank Alverson would be better equipped to handle that particular point as to what is necessary for this fleet to have in 1977.

Mr. ANDERSON. You are talking about the total of 81,000?

Mr. FELANDO. I think that is what the total comes out to.

I will defer that to Frank.

I would like at this point to clear up the spinner situation and the problem associated with it.

We have listened to a lot of people trying to describe the problem which the fishermen have at sea and I would like to have a fisherman testify in this area.

Joe.

Mr. MEDINA. Let me say we cannot survive without set on mixed schools.

Dr. Fox said it was 20 percent.

I think it varies on different boats. Last year we set on 60 percent of our schools, were mixed schools.

Mr. LEGGETT. That is on your boat?

Mr. MEDINA. Yes; our boat, last year.

Spinners are not only found in the CYRA area. I fished spinners from a 1,000 to 1.500 miles out at sea.

Mr. LEGGETT. Have you reviewed Dr. Fox's data?

Mr. MEDINA.. No, I have just looked at some of the area marked here that they found spinners about 1,500 miles out to sea.

This area from 115, which CYRA line is moved in 115 longitude to 125 longitude, that is almost straight eastern spinners.

I have seen large schools mixed there with the spotters.

As far as Mr. Butler saying that it is real easy to tell if there are spinners in a school, or they are mixed school, it is not that easy. In fact, I do not think Mr. Butler could tell what a spotter was and what a spinner is if he was out there.

Mr. BUTLER. I think that remark is wrong and is a stupid statement to have made, since I do have some sea experience observing porpoise species.

Excuse this outburst.

I do not like that sort of *ad hominem* discourtesy any more than Mr. Felando likes to hear tuna fishermen called liars.

Mr. MEDINA. I am not being discourteous.

It is not that easy to tell an eastern spinner from a white belly spinner.

A lot of times if the porpoise are moving and jumping, it is easy to tell there are spinners in the school because the way they jump, they spin.

A lot of times, it is not moving much and not jumping, and one school starts moving and running together, and they do not jump that way.

You could set on a school you think is all spotters and if it is a fairly large school, come up with 100 spinners mixed in that you never saw.

Mr. LEGGETT. The testimony given is that if a school did not look like spinners and you set on them, what you do is take care to get all the porpoise out.

Mr. MEDINA. Well, the best way to get them out is to back them out, the way we normally would do.

Mr. LEGGETT. Very carefully.

Of course, you are very careful?

Mr. MEDINA. Yes.

I will be glad to answer any questions you might have.

Mr. LEGGETT. If there are certain of these schools that are, say, not mixed, like good hunting porpoise, it might make sense to equip some of them with a radio transmitter and follow them and then, say, if we had a particular tuna boat crew or boat that had particular expertise, that had very low incidence and in taking porpoise per ton——

Mr. MEDINA. Could I answer that?

Mr. LEGGETT. Then give him a special permit to use the transmitter and kind of see what they do.

Mr. MEDINA. The only problem there is that they disband at night, they feeed, and in the morning they come back together.

Sometimes a school can change.

It can pick up spinners during the night and pick up spotters. I have seen schools that we have followed there that have increased in the night, have gotten smaller the next day, having changed from maybe half and half to maybe three-quarters to a quarter.

That would be hard to do. It is fine to follow the school, but it still does not mean it is going to be all spotters the next day.

Mr. LEGGETT. Everybody is threshing around for solutions but apparently none are readily at hand.

That is helpful.

You want Frank to talk now?

Mr. FELANDO. I would like to have Frank explain these three charts.

You see a dark heavy line——

Mr. LEGGETT. Which are the charts?

Mr. FELANDO. The three different charts. One is entitled Expanded Geographical Distribution of Spotted Dolphin.

Mr. LEGGETT. Where did this chart come from?

It seems to be the same chart Mr. Butler was talking about.

Mr. FELANDO. I will have Dr. Alverson explain the charts for you. There are two charts dealing with spinner porpoise, one on the white belly and one on the eastern spinner.

The heavy dark line represents the original area described by the National Marine Fishery Service.

Then you will see dots and squares or circles outside of that area. That will represent the information that is being developed indicating the new sightings, the expanded area of the distribution of the animals involved.

Frank, can you take over?

Mr. Alverson. Yes.

The distribution charts are exactly the ones that Mr. Butler presented to the committee earlier.

I believe they are the definitions as defined by the Stock Assessment Panel back in July of 1976.

What I have merely done is drawn with a heavy line for each of the species stock, the distribution as reported by the Stock Assessment Panel, and then merely plotted on for each any observations or records of that species stock found outside the distributional area.

The source of the information, I believe, without exception is the Government itself.

On the back of each of the distribution charts I have a legend which notes where the information was derived from. If you take a look at the one that illustrates the eastern spinner, and flip it over, you will notice that the additional information was drawn from the National Marine Fishery Service observers and gear technicians in 1976.

For the eastern spinner it merely indicates that the animal is found to at least 130 west longitude and perhaps further, and if you look at the chart right about dead center in all the little circles which represent observer and gear technician data, you will find a triangle some 700 miles outside of the legal or the defined range of eastern spinner. That represents an observation by a NMFS vessel in 1977.

I do not think there is any doubt that the distributions as defined by the Stock Assessment Panel were limited in nature, it even ignored their own information.

Someone should reassess the situation with respect to that species stock; the other two charts are for THC spotted dolphin and white belly spinner and are of similar nature, and on the back of each plot is the source of information.

Mr. Leggett. Why is there very little plotting inside that heavy line?

Mr. Alverson. To the inside, that is defined range.

What I was trying to plot were those observations contiguous to or outside of the known range in all cases.

I am not quibbling.

If you will move, for instance, to white belly spinner——

Mr. Leggett. But this could be significant, now you could count the dots.

You have got 29 dots, say, north of Peru, outside the heavy line area.

Mr. Alverson. Is that for eastern spinner?

Mr. Leggett. I was counting those round dots on this map——

Mr. Alverson. If you will flip the back over, it will tell you what species.

Mr. Leggett. It says eastern spinner.

Now, those 29 dots were recorded during sightings in 1974, 1975 and 1976.

Mr. Alverson. All those dots, it says National Marine Fishery Service observers and gear technicians in 1976 period.

Mr. Leggett. That was this year.

Mr. ALVERSON. Last year, 1976.

Mr. LEGGETT. Sorry about that.

That would be last year.

Now, I said 29 dots.

Mr. ALVERSON. Yes.

Mr. LEGGETT. Now, those were either mixed schools or all spinner, is that right?

Mr. ALVERSON. They were either mixed spotter or there could be some pure eastern—although if memory serves me right, most of those were in mixed combinations.

Mr. LEGGETT. Now, that was 29.

Now, what total number of porpoise schools did those observers observe in that area?

Mr. ALVERSON. That, I could not tell you.

One would have to go back to the original information.

All I can tell you is, that in 1976 outside the line approximately 12 percent of the yellowfin were taken on schools of spotters with mixed eastern spinners.

Mr. LEGGETT. Twelve percent?

Mr. ALVERSON. Eastern spinners—about 11 percent.

Mr. LEGGETT. Inside the line what percentage are taken?

Mr. ALVERSON. That, I do not know. But I would hazard a guess that of the tunas taken in association with porpoise on inside, it must have been closer to 35 percent or so.

It varies from year to year and without definite numbers I hesitate to make an estimate.

Mr. LEGGETT. Do you have any information to contradict the estimate that Dr. Fox gave?

Mr. ALVERSON. Dr. Fox and I are both using the same source of data.

I do not quibble one bit with Dr. Fox's numbers.

I think he averaged inside and outside for spinners. But other than that——

Mr. LEGGETT. If he averaged inside and outside, he found 23 percent.

Mr. ALVERSON. That is correct.

Mr. LEGGETT. That is 23 percent of the taking on porpoise.

Mr. ALVERSON. Correct.

Mr. LEGGETT. Well, only 70 percent of the yellowfin catch is taken on porpoise and if yellowfin taken is only 70 percent of all the taking, then you come out with setting on spinners is 10 percent of the total take.

Mr. ALVERSON. Yes.

If you take 30 to 60,000 jobs in the tuna industry, and it is probably less than two-tenths of 1 percent of all employment in the United States and would you discard it? The whole industry? Let me point out that in certain areas, and at certain times, the quantity of spinners involved is much higher than 10 percent you are trying to average out.

Let me give you a case.

We come here at several hearings, and we have talked about a vessel called the *Elizabeth C.J.*, rather a famous ship.

Let me tell you. Manuel Jorge's break even point is somewhere around 13 tons of fish a day. To do that he has got to stay at sea 270 days a year.

He made a famous trip. He was out 63 days. He made 47 sets, 45 of those on porpoise.

He caught a little over 1.000 tons of fish.

In other words, he averaged 16 tons per day at sea, Manuel Jorge did better than break even.

Now, if you take a look at what he did, 522 tons of that fish was caught on mixed sets in association with eastern spinners. If you had subtracted that out, let us say the law was in effect this year, Manuel Jorge would have averaged 7.76 tons per day.

He would have gone broke. He could not have afforded to make that trip. He would not have caught 1.000 tons. Now, you go tell Manuel Jorge that 10 percent is not going to hurt him, and he is broke.

Mr. **Felando**. That is why, I think, we are dealing with numbers like this, with all due respect, Mr. Chairman, I think you have to be very careful.

Because of the request of the union officials, there are a couple things that I want to bring out with respect to Mr. Butler's statement, as to Puerto Rico.

Mr. **Leggett**. They are organized down there?

Mr. **Felando**. Of course, Mr. Drozak could speak on that more effectively.

This is the first chance I have had to speak after Mr. Butler and I do not want to abuse this privilege, and I will at a later date answer some of the points that he raises in his statement.

However, there is one additional point and I think we are ready to conclude, unless you have some questions, and that is we understand that Mr. Fensterwald from the Committee on Humane Legislation has called a lawsuit today asking for preliminary injunction with respect to enjoining the 1977 regulatory program.

It seems to me if an injunction was issued, I guess the issuance of a permit will be enjoined, regulations will be enjoined and the industry, of course, will be faced with this continuing problem.

Therefore, to suggest that everything looks all right, and we really only have a 2 or 3 week problem I think is wrong.

I would like to state this: In my opinion, the U.S. tuna fleet and the U.S. consumer is facing a disaster after 1977. Less fish, and for sure there is going to be less supply of canned tuna for the U.S. consumer, and unless Congress takes immediate action to amend the Marine Mammal Protection Act, I think the combination of a variety of factors might already have destroyed the continued viability of the U.S. tuna fleet.

I just do not see how capital formation in this fleet which is really the real characteristic on a tuna fleet, how this capital formation, the desire to develop in this industry, can continue with the uncertainty about the future, the uncertainty about whether you are going to operate next week or next year.

Mr. **Leggett**. Mr. Fensterwald has noted in his lawsuit that the regulations on mixed schools are unenforceable. What is your view on that?

Mr. **Felando.** Well, we think it is very enforceable. We have an informer's fee of $2,500.

Mr. **Leggett.** Has anybody ever collected that fee?

Mr. **Felando.** No, but it is there. And the fact is that——

Mr. **Leggett.** Then Mr. McCloskey is right in some of his allegations. And if that informer's fee is still on, it would seem that it might be an incentive.

Mr. **Felando.** The fact is that there is a criminal penalty of imprisonment for 1 year and a $20,000 fine; and I think forfeiture of the entire cargo can amount to a criminal penalty.

Mr. **Leggett.** There has been no forfeiture to date?

Mr. **Felando.** No, but I have been involved in the forfeiture penalty aspect in the Tuna Conventions Act, and I know the consequences of that and the industry is fully informed. We know what can be done in court, and we know what the impact of the violations are, Mr. Chairman, of the penalties are. And you have people that have made tremendous investments—investments that have gone on through generations now—and people are not going to take that risk. We know they are not going to take that risk.

Mr. **Leggett.** Now, there was some indication some place that the tuna industry was overcapitalized. Maybe that was from the GAO report.

Mr. **Felando.** I have examined that GAO report, and I cannot find anything in there that suggests that. We have heard that same argument now; the same argument was made, and the administrative law judge denied that completely, Mr. Chairman, that there was an overcapitalization in this fleet. The fact is that the fleet has increased its ability to compete. And the investment that was required, it was made in the late sixties. Yes, about 78 of the 113 vessels in class III have been built since 1969. And that is why we have the ability today to go fish in the South Atlantic to adjust to the yellowfin tuna conservation program.

And, incidentally, the area in the CYRA outside of the CRYA is the second most frequented area in the world today with respect to cyclonic storms, and you have to have large vessels to fish out there.

And because of the investment that has been made in the industry, we do have the opportunity to develop new areas in the central and western Pacific. And we want to continue this opportunity to invest in our vessels and in new vessels and in new gear.

But I think because of the faulty administration of this act, because of the action of certain militant lobbying groups in Washington, D.C., and other persons who do not properly inform the U.S. public, because of the harsh and, I think, unwise judicial decisions, and because, I think, of a misinformed and yet unresponsive Congress, and also because of, I think, actions by tuna industry representatives who have failed, I think, in properly expressing the fishermen's side and failing to present the fact that the fishermen basically rely on the porpoise for their economic survival—and I think that is why we are in trouble today. Well, I do not think anyone is free of being attacked for not doing the job right.

And I am just suggesting there is a need to amend this act. There is a crying need to amend this act.

Thank you.

Mr. LEGGETT. Very good.

Now, if you will agree that the *Elizabeth C.J.* experience in taking porpoises was not exactly representative—although a model—perhaps it is also possible that the 50-percent taking on mixed eastern spinners was not also the average.

Mr. FELANDO. I think——

Mr. LEGGETT. So then we get back to the fact——

Mr. FELANDO. I talked to Captain Joe, and I think he told me in one trip it was 80 percent or 90 percent or, then again, 60 percent. It depends on where you operate.

Mr. LEGGETT. Well, we have still got to get back to averages, and I think that if we are talking about averages, the evidence that both Frank and Dr. Fox are operating under are both the same. And that evidence—irrefutable at this point in our record—is that 10 percent of the yellowfin, and the skipjack is taken off of mixed schools.

Mr. FELANDO. Well, I will tell you what. The figures we have are that 54 percent of the catch was taken on mixed schools, and 28 percent on eastern spinners. I think this is an average figure from the period of 1972 to 1975.

Frank, do you have those graphs? Can I see those graphs?

No, excuse me, Mr. Chairman; from 1974 to 1976, our information is that 54 percent of the schools involved spotters and spinners; 16 percent involved spotters and eastern spinners; 15.9 percent involved spotters and white bellies; and 15.75 percent were unidentified. That is on the inside. That is inside the CYRA.

With respect to the outside, you will find that the percentage is 67.5 percent as to mixed schools, spinners and spotters. And that is when you get down to a lower figure and to the spotters, and spinners, Mr. Chairman, of slightly better than 8 percent and 39.6 percent with respect to spotters and whitebellies.

So we can argue percentages all we want here and get an average figure, but the fact is when you get the fishermen and the fishermen are on the stand, under oath—and subject to cross-examination in San Diego, not only by counsel but by the administrative law judge himself—and they said they had to have the opportunity to fish on spotters and eastern spinner spotters, and whitebelly spinners.

Mr. LEGGETT. That is the conclusion. What we need are the facts to support that.

Mr. ALVERSON. Could I elucidate a little about the facts for you, Congressman? Each year approximately, more or less, 60 percent of our catch is taken on mixed sets.

Now, when you take a look at the mortality breakout, approximately 32 percent or 33 percent of the mortality every year is "spinners"; the mix of eastern and whitebelly spinner mortality within that 32, Mr. Chairman, varies from year to year.

Given the current regulations, no setting on eastern spinners, the fleet is going to make its mixed sets on whitebelly spinners and spotters. They are going to have to move out of the area where the eastern spinner dominates. And given that fact, if we can have a kill rate of only a half a ton per porpoise, we are going to reach the quota of whitebelly spinners at approximately the 50,000-ton catch of yellowfin.

That means we are going to be denied a shot at something from there up to 130,000 or so tons of fish.

In other words——

Mr. LEGGETT. Of course, do not the foreigners go inshore, where you are not going to go?

Mr. ALVERSON. Do what?

Mr. LEGGETT. Will not the foreigners go in-shore, where you are not going to be going, and where the easterns predominate, and will not that then leave more in the area but not close in?

Mr. ALVERSON. I cannot speak for the foreigners.

Mr. LEGGETT. Well, will they not be fools not to go in there, if we are not going to be going there?

Mr. ALVERSON. Right now, if we are going to go for school fish, yellowfin, that is one of the areas that we have got to try to make it in.

Mr. LEGGETT. So you would be in there?

Mr. ALVERSON. Well, if they were fishing.

Quite frankly, I think the fishermen at this point in time have two choices: they can keep the vessel tied alongside the dock and lose money or go fishing and lose more money. And I would like to tell you that the catch of yellowfin last year at the same point in time as we have 41,800, this year, Mr. Chairman, was 56,600 tons. In other words, that is what it was at the end of February last year.

Now, yellowfin are not any less abundant or available this year than they were last year. However, the U.S. fleet cannot—well, it has only been able to set about 4 days, someone said, on the porpoise.

Mr. LEGGETT. I understand.

Mr. ALVERSON. The fishermen are going by schools of porpoise and they say the fish are there, but, you know, keep your hands behind your back. We are at the 74 percent level of the production of last year. That is for the international fleet, Mr. Chairman; what share the United States got out of that, I do not know.

The skipjack availability this year is down sharply.

Mr. LEGGETT. Let's see, Mr. Felando indicated you had taken 23,000 tons.

Mr. ALVERSON. He indicates that for——

Mr. FELANDO. That is only for our vessels in our membership. They have about, oh, something like 63 or 64 thousand—no; 68,000 tons of capacity and they only have 23,000 tons of fish aboard. Now, they cannot make it out there. Captain Joe Madina has his vessel with a carrying capacity of 1,200 tons and they are coming home with 360 tons.

Manuel Silva brought both of his boats in, and he is president of the American Tunaboat Association. The capacity there is slightly over 1,000 tons, and it is coming home with 450 tons.

Mr. LEGGETT. That is not setting on porpoise at all?

Mr. FELANDO. They cannot make it out there under the conditions.

Mr. LEGGETT. I understand.

Mr. FELANDO. And to suggest now that they can make it on the basis of 6,500, you produce a fisherman to me and tell that fisherman he can make it on that basis, and see what he says. He cannot do it.

Mr. LEGGETT. 6.500 what?

Mr. FELANDO. He has to have the right to fish on mixed schools; he has to have the minimum we are suggesting of 6.500 on the eastern spinners, an increase of another 9.000 or 8.000 to the allotted 7,800 for the white-belly spinners; that comes to around 17,000 white-belly spinners.

Mr. LEGGETT. Of course we are in a situation where regulations are promulgated——

Mr. FELANDO. Yes.

Mr. LEGGETT [continuing]. And so they can go through a new promulgation of regulations. I mean the Congress cannot amend the regulations. It can amend the law.

Mr. FELANDO. Yes.

Mr. LEGGETT. But the time it would take the Congress to review this total matter and come up with specific numbers would——

Mr. FELANDO. We are not suggesting that Congress should do that. I do not think that is their expertise.

Mr. LEGGETT. Well, if the administration is going to go back and repromulgate, it is going to take a couple of months; is it not? How do they modify the regulations now that they are published?

Mr. FELANDO. I do not know. I would have to talk to counsel on that.

Mr. LEGGETT. We are talking about what is the art of the possible at this point.

Mr. FELANDO. Yes; we are faced with the fact——

Mr. LEGGETT. And I recognize your desire for 17,000 whitebellies and your 6.000 eastern spinners and the additional number of the spotted, but it is not possible at this point.

Mr. FELANDO. Well, we are faced with the fact that we do not even have a permit. We expect to file our application this week. The possibility of getting a permit now is April 11 people say, and now we are faced with a lawsuit.

And a motion on a preliminary injunction probably will be set. And what does that do? If the preliminary injunction is issued, where are we?

Mr. LEGGETT. Oh, anybody can file a lawsuit.

Mr. FELANDO. Well, the issuance of the preliminary injunction, if it goes forward, where are we?

Mr. LEGGETT. Of course, you are talking about what possibly might happen. And I do not know what judge has got this lawsuit.

Mr. FELANDO. I think we are faced with the fact that the law has created this morass of difficulties.

Mr. LEGGETT. You do not think as a lawyer.

All right, let's see. Is there anything further?

Mr. Mulligan, do you want to say something?

Mr. MULLIGAN. Thank you, Mr. Chairman. I want to add the voice of the U.S. tuna canner to our comments today. I am John Mulligan, executive director of the Tuna Research Foundation in Terminal Island, Calif., which is a nonprofit trade foundation representing the major tuna processors in the United States.

Our members are operating plants in California, Hawaii, Puerto Rico, American Samoa, and Maryland. I also serve as president and chairman of the board of the Porpoise Rescue Foundation, and this is an industry-sponsored and financially supported foundation established to coordinate, manage, and implement research programs designed to reduce porpoise mortality.

I appear on behalf of the members of the Tuna Research Foundation as well as Sun Harbor Industry and PanaPacific Fisheries.

Currently these are U.S. tuna canners not affiliated with our foundation.

I am here to address the impact of the 1977 regulations over the taking of marine mammals in the course of commercial fishing. These regulations will have an impact on the tuna canning industry as possibly as severe as the impact on the purse seine fleet. A large part of the purse seine fleet will not be able to operate to full capacity; and income to the vessel and crew will decline as catch rates decrease.

As a result of the reduced landings and the imposition of overbroad import restrictions, the output of the domestic canning industry will be curtailed significantly—resulting in decreased employment in the tuna canning industry.

During the past 5 years, imports of tuna have accounted for an average of 58.9 percent of the raw materials supply process by U.S. tuna canners, Mr. Chairman, ranging from 49.2 percent in 1975 to 64.8 percent in 1973.

The year 1975 was the first in over 10 years that the domestic fleet landed more tuna than the supplies of imports.

In the future, the output of the U.S. canneries will depend on the impact of these regulations on both domestic landings and imports. Now, based on the National Marine Fishery Service's market reports on domestic tuna landings in California for the first months of 1977, our supply is down approximately 50 percent.

The agency has prepared an inflationary impact analysis of these regulations on the industry. I urge that this report be made available today, Mr. Chairman, and incorporate it into the record of these proceedings. It is important, Mr. Leggett, that you and the committee, as well as all of those who are participating in these hearings today, have the benefit of this analysis.

Let me conclude——

Mr. Leggett. We will try to get that.

Mr. Mulligan. Let me conclude by saying that the tuna industry has had a history of research and improvement in methods of reduced porpoise mortality, Mr. Chairman, on a cooperative and progressive basis. In spite of the continuous litigation and unreasonable and impractical demands upon it, the industry went forward and made dramatic improvements on a regular basis. We formed the Porpoise Rescue Foundation: we cooperatively developed research programs with the National Marine Fisheries Service, and the Marine Mammal Commission; we developed a peer review group known as the Skippers' Panel: we cosponsored the Behavior Group of the *Elizabeth C.J.;* we assisted in the training and placement of government observers; we provided training programs and workshops for the crews.

And with our special gear research programs—known as the *Bolo Contender* system, and the *Elizabeth C.J.* results, Mr. Chairman, we have truly been in a research period of promised improvements in the reduction of porpoise mortality.

The exemplary results of the *Bolo Contender* experiment and the *Elizabeth C.J.* are well known to us all.

We are in the midst of our 1977 Porpoise Rescue Foundation programs, which have been fully funded, and it continues to operate. We stand on the threshold of a massive fleetwide fine-mesh experiment program, and the prospects of a dedicated research vessel.

And the reality of the 1977 regulatory regime, as it settles down on the industry—in spite of the Administrative Law Judge's decisions and recommendations, in spite of the recommendations of the department's chief scientist, despite the hours of testimony and oversight hearings before your subcommittee, Mr. Chairman—but our historic period of research and progress is in jeopardy and we are about to enter a period of struggle for economic survival.

We believe that the Marine Mammal Protection Act must be changed so that the health of the U.S. tuna industry can be assured. Only in this way can the health of the porpoise population be assured as well.

This concludes my statement on behalf of the canneries, Mr. Chairman.

Mr. LEGGETT. Thank you very much.

Mr. Alverson, do you have a comment?

Mr. ALVERSON. Yes; I would just like to set the record straight. I notice on the agenda that I am listed as representing the Porpoise Rescue Foundation.

Mr. LEGGETT. Yes.

Mr. ALVERSON. That is not true. I came on behalf of the American Tunaboat Association, and I would so wish the record to show that.

Mr. LEGGETT. All right, the record will be corrected to show that.

Mr. FELANDO. Mr. Chairman, I have one more additional remark. We supplied the committee with some charts. And, subject to your approval, I would like to have these charts—covering the distributions of the eastern spinner and the whitebelly spinner and the spotted porpoise—inserted into the record.

Mr. LEGGETT. All right.

At this point a chart which is called "figure 12"——

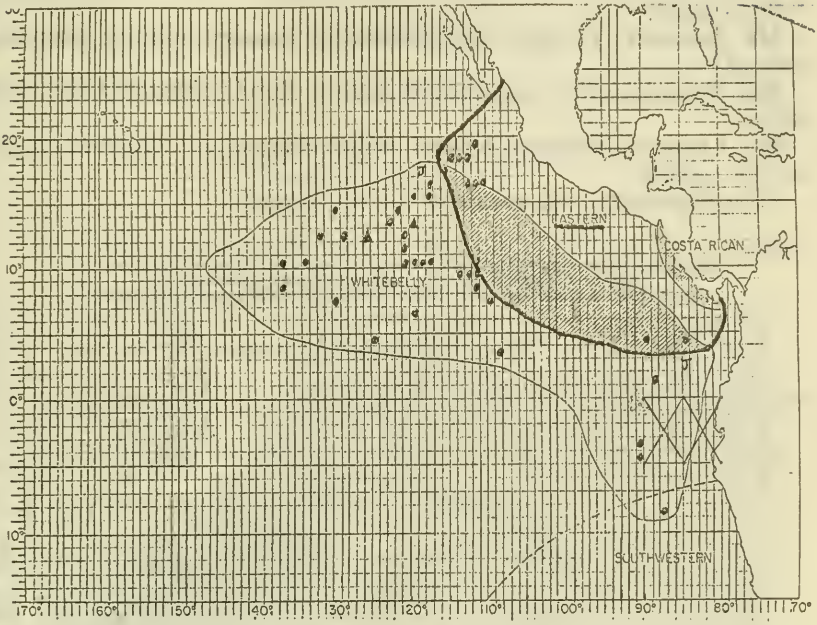
Mr. ALVERSON. You better call one 12–A and the other 12–B.

Mr. LEGGETT. OK. We will call figure 12 12–A, which is entitled on the back, "distribution of eastern spinner porpoise"—well, that will appear in the record.

[The following was received for the record:]

FIGURE 12

DISTRIBUTION OF THE EASTERN FORM OF SPINNER PORPOISE AS DEPICTED BY PANEL OF EXPERTS AND AS INDICATED BY NMFS PERSONNEL; OBSERVATIONS PLOTTED ARE ONLY THOSE CONTIGUOUS TO OR OUTSIDE THE RANGE


EASTERN
COSTA RICAN
WHITEBELLY
SOUTHWESTERN
20°
10°
0°
10°
170°
160°
150°
140°
130°
120°
110°
100°
90°
80°
70°

Source: National Marine Fisheries Service

LEGEND

FIGURE 12

x --- Perrin, Holts, Miller - LJ 76-13

o --- NMFS Observers and Gear Technicians on United States Seiners - 1976

J --- R/S David Starr Jordan - 1976

▲ --- R/S David Starr Jordan - 1977

Mr. LEGGETT. The chart called 12–B—is that the one with the red marks on it?

Mr. FELANDO. No. On the back page you will see where it says "white belly"——

Mr. LEGGETT. It says "distribution of eastern spinner porpoise"; correct?

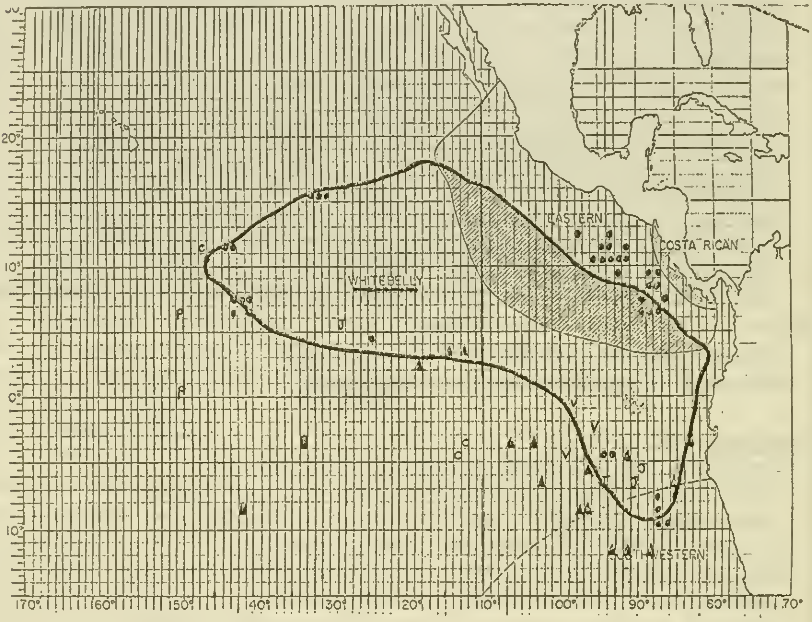
Mr. FELANDO. No; you should have a chart indicating the white-belly.

Mr. LEGGETT. We have a chart called "figure 11." That will appear in the record.

[The following was received for the record:]

FIGURE 11

DISTRIBUTION OF THE WHITE BELLY FORM OF SPINNER PORPOISE AS DEPICTED BY PANEL OF EXPERTS AND AS INDICATED BY NMFS PERSONNEL; OBSERVATIONS PLOTTED ARE ONLY THOSE CONTIGUOUS TO OR OUTSIDE THE RANGE


20°
10°
0°
10°
EASTERN
COSTA RICAN
WHITEBELLY
WESTERN
170°
160°
150°
140°
130°
120°
110°
100°
90°
80°
70°

Source: National Marine Fisheries Service

LEGEND

FIGURE 11

V --- R/S Vnushitel'Nyi - 1975

J --- R/S David Starr Jordan - 1976

C --- R/S Townsend Cromwell - 1976

● --- NMFS Observers and Gear Technicians on United States Seiners - 1976

P --- R/S Oceanographer - 1976

▲ --- R/S David Starr Jordan - 1977

■ --- R/S Townsend Cromwell - 1977

Mr. **Leggett.** And if there is a 12–B, I do not have it.

Mr. **Felando.** I have it.

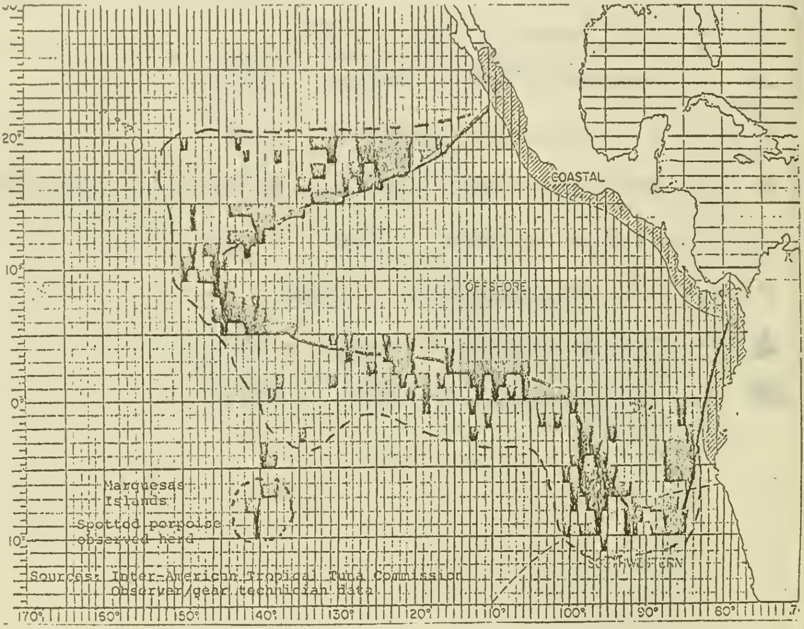
Mr. **Spensley.** Is that the white-belly?

Mr. **Felando.** Yes.

Mr. **Leggett.** And 12–B will be the white-belly location, and that will go in the record.

[The following was received for the record:]

FIGURE 12B OFFSHORE DISTRIBUTION OF SPOTTED PORPOISE AND THE WHITE BELLY FORM OF SPINNER AS DEPICTED BY PANEL OF EXPERTS AND AS INDICATED BY FISHING



Sources: Inter-American Tropical Tuna Commission Observer/gear technician data

Areas fished by the fleet for yellowfin tuna in association with porpoise 1971-1976

Mr. **Leggett.** All right.

Now, do my colleagues have any questions?

Mr. Anderson?

Mr. **Anderson.** Yes.

Mr. Felando, one of the previous witnesses has stated that any amendments to the Marine Mammal Act will destroy the effectiveness of our negotiators on international conferences. And without commenting on how effective they have been, do you believe that any amendment to the Marine Mammal Act would destroy our effectiveness? You have been on these international conferences and probably can speak as well as anyone in this room.

Mr. **Felando.** No; the answer is no.

I was down in Nicaragua, involving the Inter-American Tropical Tuna Commission. I was there with Milton Kaufmann. And I think an amendment of an act will not in itself affect the negotiating ability r will or desire on the part of the U.S. Government—including the tate Department and the Department of Commerce, and, in fact, 1e industry—to see to it that negotiations in this area are successful.

We are as much interested as is the U.S. Government to see to it 1at those negotiations are successful. In fact, we have some sugges-ons where perhaps by amending the act, Mr. Anderson, we think 1e negotiating ability and the desire of the Government to negotiate ill be improved.

Mr. Anderson. So it is possible an amendment could make our egotiations more effective rather than less?

Mr. Felando. That is correct.

Mr. Anderson. Another remark that was made was on the 100-ercent observers; that the cost would be, I think—I think the word sed was "insignificant," and "miniscule" and so on.

Roughly, what would it cost? How little would it be? Is it so mall that it would not mean anything as far as an increase per can f tuna?

Mr. Felando. Let me say this: Everyone assumes that the vessels wners have a remarkable ability to increase the price of fish. That s an assumption that I think should not be made, because I have een involved, as has Mr. Royal, and Mr. Royal knows full well that hat is a difficult task to negotiate the price of fish.

So the suggestion further assumes that we have this ability to ransfer costs to the canners who will buy the fish and that the can-ers in turn will be able to transfer the cost to the consumer. I ave heard that the cost of an observer program would be about $4 illion to $5 million.

This represents a significant percentage of certainly the boat share f the gross revenue. And I would have to come up with some figures n it. But I think also if the boat owner is going to have to negotiate ith the union to see to it that it goes on trip expense, believe me, I now I am going to have trouble negotiating with John Royal or, or that matter, Jimmy Bozzo.

So the fact is that the vessel owner is stuck with this cost.

Our first job is to see to it how am I going to see to it that this is trip expense that will be shared by the vessel owner and the crews? hat means I have got to start negotiating with the union. That is he other assumption that people are forgetting.

So the union, I am sure, is going to tell me that this will be a ignificant percent of the gross revenue per trip.

And I guess it is going to be a fixed expense: Whether we have nough fish to cover the trip cost or not, this expense is going to ave to be paid.

So sometimes if you have a bum trip, the individual vessel owner as to pay the cost or, for that matter, the crew members and the essel owner would. And so this could be a very significant expense n a trip.

Mr. Leggett. The expense has not been levied yet.

Mr. Felando. Well, no, it has not, but he is asking me what would t mean. And I am telling you my first problem, as a vessel owner, is who is going to pay for it.

If the vessel owner has to pay for it, it can represent a significant percentage of the boat's share.

You see, in our industry we operate on like a joint-venture basis: Gross revenue, less agreed trip expenses, and the balance divided by the crew and the vessel owner. Then the individual crews divide up the crew's share among themselves.

Mr. LEGGETT. How many tons of fish did the average big boat take last year?

Mr. FELANDO. I would have to find out, to give you that.

Mr. LEGGETT. What is your ballpark figure?

Mr. FELANDO. I think a very successful vessel of 1,100 or 1,200 would have to come up with 4,000 tons and, as I said before, 3,000 is a break-even.

Mr. LEGGETT. How much do they get a ton?

Mr. ROYAL. Not enough.

Mr. FELANDO. If it is all yellowfin, the present price is $665 a ton. Do you want to go into the itemization of trip expense? I will do that for you.

Right now we are talking about a fuel expense of around 40 cents a gallon. A vessel that size needs, I would think—Joe, correct me—at least 200,000 gallons—no, 250,000. He just corrected me.

You are consuming 4,000 to 5,000 gallons a day, and we are not even talking about lube oil, which is a little higher. That is $2,000 a day just for fuel.

Mr. LEGGETT. What do you anticipate the cost of an observer on a full-time basis?

Mr. FELANDO. I really do not know. We would have to take a look at it. If he is going to be paid on a daily basis——

Mr. LEGGETT. Would he get more than $1,000 a month?

Mr. FELANDO. Is he going to be on a monthly basis? Is he going to get a share like a crew member? Because, I guess, we are going to have to kick off a crew member to put him on, I guess.

Mr. ROYAL. Is he going to join a union?

Mr. LEGGETT. Well, assuming if you paid him $15,000 a year, that would be $15,000 as part of a $2.7 million gross.

Mr. FELANDO. Would you also estimate what the net share to the crew and the boat would be when you figure out the rest?

Mr. LEGGETT. Well, it depends on who——

Mr. FELANDO. I have one vessel member who is no longer a member because his total fish catch last year, as I recall it, on a vessel that has the capacity of 1,400 tons, Mr. Chairman, was about 800 tons.

Mr. LEGGETT. OK.

Mr. ALVERSON. You have social costs, too, along with the salary and a few other odds and ends.

Mr. ROYAL. The government of Peru just tripled their license cost.

Mr. LEGGETT. I know. They want something like 60,000 or 80.000.

Mr. ROYAL. You know, when you start adding all of this together, you know, just one example—now that I have got my mouth in gear—the health and welfare fund jumped from $78 a head per family to $120. You know, where are we going to get the scratch to take care of all of these problems?

It is not going to be taken care of elsewhere. These doctors are not going to take care of you for free.

One point I should have made a while ago to you and the committee is that I am on the Pacific Marine Regional Council of the Two Hundred Mile Extension Act. You know, we told everybody in the United States that we have got to go out and protect ourselves at 200 miles. We got a big problem with enforcement capabilities: aircraft, ships, personnel, men, Coast Guard; you name it.

You know, it seems to me we would be far better off trying to protect that 200 miles from Maine to Alaska and those resources in there from foreign encroachment and other things that are taking place, Mr. Chairman, than to spend so much time and effort going 15,000 miles out in the Pacific Ocean.

Mr. LEGGETT. Well, hake is being taken out there——

Mr. ROYAL. But who eats hake?

Mr. LEGGETT. But I say that is a large part of what is being taken out there.

Mr. ALVERSON. Perhaps the fee taken for purposes of fishing for hake, Mr. Chairman, can go towards the $90 million it takes the Coast Guard to go out there and catch people that are paying that $15 million fee.

Mr. LEGGETT. Right. We intend that this program be self-sustaining.

Mr. ROYAL. You made a point earlier that I think was an excellent point, that the money the Government hopes to derive from foreign fishing licenses that is going to the U.S. Treasury, that maybe that money could be—and I think originally was intended—to bring some relief to the domestic industry. I am hoping that would be one approach or resolution to this financial problem.

Mr. LEGGETT. Your industry did pay, I think, $20,000 a boat last year to Ecuador. As I understand it, the industry is not paying anything this year. Is that correct?

Nobody is taking out a license this year?

Mr. FELANDO. You mean the foreign?

Mr. LEGGETT. Yes.

Mr. FELANDO. Definitely when Peru increased from $20 to $80 a net ton—and that would be, I guess, on a vessel, well, about $48,000, I guess—to look for fish off the coast of Peru, well, the idea of fishing off Peru became a problem. I do not know of any vessel that purchased any license from Peru. I do not know any license purchases off of Ecuador this year, but I can check on it.

Mr. LEGGETT. Have they gone to $80 per ton, too?

Mr. FELANDO. $60. But there is a problem with Ecuador, in that even if you have a license, you cannot fish and are subject to seizure if you fish within 60 miles of the coast or 60 miles of their island.

Mr. LEGGETT. OK. And that is on the basis of tonnage of the vessel?

Mr. FELANDO. The net tonnage of the vessel as indicated in the ship's document.

Mr. LEGGETT. Mr. Anderson?

Mr. ANDERSON. Another question. I believe you and others have mentioned certain amendments. Do you have any amendments that you are suggesting to us? What will they be?

Mr. FELLANDO. Well, I think we have Mr. Hodges, who has some views on these amendments. Rather than take the time to explain them now. I think it would be best to present them to you after th hearing. We have some suggestions that deal principally with secti 101, that deal specifically with commercial fishing, and some sugge tions dealing with section 111, that again deals with commerci fishing.

Mr. Anderson. We heard the idea there should be some amen ments, and it is very difficult to discuss amendments unless we s them.

Mr. Felando. Yes.

Mr. Anderson. But I heard this now for some time, and I wou like to know what it is we are talking about.

Mr. Felando. I am sorry, Congressman Anderson, but I do n have that. I will see to it you get a copy of these ideas.

Mr. Anderson. And my last question regards Captain Medir You were estimating a while ago the difference between the spinn and the others, and you did not make it clear to me how diffic it was to tell between the two types of spinneers, between the whi belly and the eastern. Is that easy?

I think somebody said it was like telling a blond from a brune or something. Is it very easy when they are going along calmly, can you explain that to me.

Mr. Medina. It depends on weather conditions. If it is a calm d and they are moving and jumping, it is pretty easy to tell it.

Mr. Anderson. But you have to be close enough?

Mr. Medina. Yes, that is true.

Then the fin is different. On the spinner porpoise the fin com forward more, and on the spotter porpoise it goes back.

What I was trying to explain earlier is when you have a bun of porpoises moving and traveling and all jumping and running, is pretty hard to distinguish a fin on them.

Mr. Anderson. Can you distinguish between the white-belly a the eastern spinner?

Mr. Medina. You can tell the white-belly, because you see the whi spot on the white-belly spinner.

Mr. Anderson. But only if they are jumping?

Mr. Medina. Only if they are jumping, yes, or if they are movir out of the water.

Mr. Anderson. Are they doing this most of the time? When yc go out there, how are they moving?

Mr. Medina. Well, sometimes the school is at a rest and they a not moving much. Other times they are moving and jumping ar you can distinguish.

On the whole, you can distinguish whether there are spinners the school pretty well, but there are other times when the school moving and there are just perhaps a few mixed in. And if you ha a large school of 1,000 or 1,500 porpoises and there is only, say, 30 40 or 100 spinners in there and they are not jumping, it is pretty har to distinguish it until you can actually get close enough to make th set. And even sometimes you think it is all spotters and you do mal the set and get them in the nets, then you do see a few spinne in there.

Mr. Anderson. Thank you, Mr. Chairman.

Mr. LEGGETT. Mr. Mannina?

Mr. MANNINA. Thank you, Mr. Chairman.

Mr. McCloskey was hopeful that you would submit for the record he number of porpoises taken by each vessel of more than 400 tons n 1976, according to the skipper's logbook. Is that information availble from you or from the National Marine Fisheries Service?

Mr. FELANDO. It is available from the National Marine Fisheries Service. All we do is obtain copies. I think your most direct source vould be the National Marine Fisheries Service.

Mr. LEGGETT. We can request that of them, George.

Mr. FELANDO. I would like to point out that that rule came about s the result of regulatory hearings in the latter part of 1974. Even Government representatives at that time from the region testified hey thought it was a useless piece of paperwork. The director of the nter-American Tropical Tuna Commission though that that type of eport was not valuable.

Frankly, we think it is not valuable, either, because no one relies n that information for any real scientific work. The information is ased on a random selection of vessels by the Government, and the lacement of observers on those vessels. And it is that sample size hat is the basis for the statistics of the Government, which everyone massages. And this system was developed in 1974. No, in 1973.

The fact is that really when you look at it, there has been a limited period of time in the development of the statistics on this whole probem. And one of the difficulties—and I assure you of this—is that ven on this mixed school situation, Mr. Chairman, we do not have a eal good sample size for 1972, which is the year that we think we are n, Mr. Chairman, in the sense of fishing conditions.

Mr. LEGGETT. Thank you very much.

Now we will have the Marine Mammal Commission and we will hear from Dr. Chapman. Dr. Chapman is accompanied by Mr. Eisenbud.

STATEMENT OF DOUGLAS CHAPMAN, CHAIRMAN, MARINE MAMMAL COMMISSION; ACCOMPANIED BY ROBERT EISENBUD, COUNSEL

Dr. CHAPMAN. Thank you, Mr. Chairman.

Mr. LEGGETT. Is there a statement?

Dr. CHAPMAN. Yes, Mr. Chairman.

Thank you for the opportunity to be present on behalf of the Marine Mammal Commission.

As you mentioned, I do have Mr. Eisenbud, the general counsel of he Commission, with me. We did not plan to make a statement, but there were several references by Dr. White this morning—testifying for NOAA—concerning the depleted status of the eastern spinner porpoise stocks, and references were made to the Commission and he Commission's position, I thought that perhaps we should amplify a little on that and I have prepared, in the interim, a short statement when I will read, with your permission.

Mr. LEGGETT. All right.

You may go ahead and read it.

Dr. CHAPMAN. The results of the La Jolla workshop as updated have led to the conclusion that the eastern spinner stock is at a level of 54 percent of its original or preexploitation size.

Further, it is the consensus of marine mammal biologists that the lower limit of the range of optimum sustainable population for marine mammals is in the range of 50 to 70 percent of the unexploited stock size. Hence, it is concluded either by comparing the present level of 54 percent with the midpoint of this range, 60 percent, or by more sophisticated analysis using modern operational research methods that the Eastern spinner stock is below the optimum level.

Can a marine mammal stock be taken much below this level and be expected to recover, and/or constitute a viable element of the ecosystem?

In regard to cetaceans, the answer is unknown. Only one depleted whale stock has rebuilt—the California gray whale and while there is much uncertainty about its numbers in earlier times, the best evidence is that the stock was never reduced below the 50 percent level. Other whole stocks that have been reduced further, for example, blue, humpback, right, and bowhead whales have shown no measurable recovery.

In the case of blue and humpback whales, the time for such recovery is only 10 to 12 years, but right and bowhead whales have been given substantial protection for 30 or more years and still remain at extremely low levels.

Furthermore, the Commission reiterates the uncertainty of the estimates that are involved in the calculations. As was pointed out in the La Jolla workshop report and has been reviewed extensively since, the estimates involve basic assumptions that are difficult to quantify in addition to the statistical uncertainties which have been quantified and included by giving various confidence limits.

A few of the aspects that have not been quantified are:

1. The validity of the estimates of school size by the tuna purse seiners. The average school size estimate changed radically from 1973 to 1974 for an unexplained reason. The larger 1974 estimates were used by the La Jolla workshop.

2. The assumption that the net recruitment rate for Eastern spinner porpoises is the same as that of the offshore spotted porpoise. The latter is based on a rather shakey comparison with a Western Pacific stock of the same species. On the other hand, the gross reproductive rate in the eastern spinner is much less than that of the offshore spotted porpoise.

3. The possibility of indirect or delayed mortalities. The observers are able to count only the animals seen to be dead or seriously injured at the time of the set and even the ones counted as seriously injured have not been considered in the La Jolla workshop analysis. If the setting process has caused additional mortalities, the present level of the stock is a lower percentage of the original level than 54.

4. The assumption that the rate of kill on unobserved purse seiners is the same as on observed purse seiners.

5. The assumption that the setting process with its possible disruption of the behavior of this social animal has not reduced the reproductive rate.

The Commission calls attention again to comparisons with the IWC situation. Beginning in the late 1960's, the International Whaling Commission tried to set quotas so that stocks would not be further reduced.

According to the best estimates available to it, sei whales in the Antarctic and North Pacific were well above MSY (maximum sustainable yield) levels. Much of the information on these stocks was based on analogy with the better studied fin whale stocks.

As more information has come to light it has become clear that the levels of the sei whales were lower than believed earlier, that the net productive rates are less, and that the sei whale stocks in the North Pacific and in several areas of the Antarctic are now well below the MSY level, which is taken to be 60 percent of the unexploited level.

The IWC has been forced to declare these to be protected with zero quotas.

I would like to go just a bit further with respect to our analogy with the International Whaling Commission.

As you know, Mr. Chairman, the United States has been in the forecfront of conservation with respect to whales and has pressed veery hard to have other countries, who have been exploiting whales, to reduce those quotas.

We have been successful in doing this. At the same time, we must recognize that the United States has been killing more cetaceans than all the other countries in the world taken together. The Commission believes, therefore, that while we need to consider the possibilities of amendment to the act, we must take into consideration a large number of factors, and particularly the position of the United States with respect to the International Whaling Commission, which was, I think, the point brought up by Colonel Kaufmann a little earlier.

That concludes my statement. We will be glad to try to answer any questions you may have, Mr. Chairman.

Mr. Leggett. All right. You indicate we ought to consider amendments, but, on the other hand, we ought to consider the effect of those amendments. Has your Commission come down on the conclusion as to whether or not you ought to recommend amendments at this point, or have you not addressed that matter?

Dr. Chapman. Do you want to speak to that? I will have Mr. Eisenbud speak to that point.

We have had some discussions, yes.

Mr. Eisenbud. Mr. Chairman, the Commission is looking very hard at the question of amendments and that look includes many of the elements that were discussed on previous occasions with the Subcommittee and with the staff.

I do not think a decision has been reached yet, but one is anticipated shortly.

Mr. Leggett. All right.

Now, just one other question. If the level of the spinner today is 54 percent of its optimum sustainable population——

Mr. Chapman. The original level, Mr. Chairman; 54 percent of the original pre-exploitation level.

Mr. Leggett. Okay. And if the optimum sustainable population is arranged between 50 and 70 percent, and if the United States does not take any this year, what is your estimate of the time that will required for the special to increase, say, 5 percent?

Dr. Chapman. I can give you that information. I think that pa ticular information was prepared in the La Jolla report. I do n have that with me. I will put it in the record, Mr. Chairman. I not have it right at my fingertips.

Mr. Leggett. Do you have a ballpark estimate on that?

Dr. Chapman. Well, Mr. Chairman——

Mr. Leggett. Just an approximation.

Dr. Chapman [continuing]. It would of course depend on t foreign kill. Hopefully we are going to have some updating of ma aspects of the situation during the current year, which may not on have some changes in the stock but changes in our best informati on those stocks.

As you know, the National Marine Fisheries Service is carryi on a new aerial survey, which hopefully is going to be a much bett aerial survey than that which was conducted in 1974. It will give better information on the status of all the stocks, including t eastern spinner stock.

As Mr. Mulligan has referred to, the proposed dedicated ves has also been discussed. It will be used to carry out extensive resear on a number of aspects of the problem, one of which will have to with the reproductive status of the stocks—including the importa eastern spinner stock. So we will perhaps get a better fix on th figure when we have that information, than we now have.

I do not want to give you a misleading answer—if we do not g any other new information, I would say that perhaps in 3 or 4 yea the eastern spinner stock would increase to about 60 percent of i original stock size.

I want to qualify that by checking with better calculations.

However, I want to assure you that we will have better inform tion by the end of this year, and certainly the answers will have to modified in light of that better information.

Mr. Leggett. All right.

The conclusion of all that is you do not know at this point?

Dr. Chapman. I am sorry, Mr. Chairman?

Mr. Leggett. The question was, if the United States does not tak and the foreigns do, the question was——

Dr. Chapman. Oh, I see. If the foreigners take the same level they have done in the past, then I would think something in th order of 3 or 4 years.

As I say, this particular calculation is available some place, and would like to check it.

Mr. Leggett. All right.

Mr. Leggett. Are there any other questions?

Mr. Spensley. Mr. Chapman, does your Commission fully suppor the National Marine Fishery's decision of 1977, of the 1977 regulations?

Dr. Chapman. Yes; speaking very broadly, and with reference t the key regulations. I will not go into great detail on the specifi questions, but when you are talking about the key regulations, fo example, the quota on the offshore spotted porpoise stock, we arrive at approximately the same level by a somewhat different approac o the problem. That approach and our recommendations were made part of the record in the expectations that we presented to the Diector of the National Marine Fisheries Service.

We also agreed that the stock of the eastern spinner is depleted, as as already been stated. That, also, is a matter of record in the hearng and was expressed in a recommendation to the Director of the National Marine Fisheries Service.

I think the answer to your question is, in general, yes.

Mr. Spensley. Just one other question. To your knowledge, has the National Marine Fishery Service—well, let me rephrase the question. Did the National Marine Fishery Service consult with you on your nforcement policy with regard to accidental catch of porpoises?

Mr. Eisenbud. There was consultation on that point and Dr. White ccurately stated the Commission's view on that point when he sumnarized it this morning in response to Mr. Leggett's question.

Mr. Spensley. Has that policy been in written form, to your nowledge, that enforcement policy that we spoke of?

Mr. Eisenbud. Well, there are two separate parts of this question, suspect. What I thought you were asking about was the distinction etween accidental and intentional catches; and allowing a quota ersus determining that it would not hurt if there were an accidental nd——

Mr. Spensley. You answered my first question and not my second, s to whether that is in written form with regard to the accidental atch.

Mr. Eisenbud. That is in the exceptions, and then there is a disussion of it which is confirmed by a letter from Mr. Blatt of the National Marine Fisheries Service to me. I would be happy to proide that for the record.

[The following was received:]

U. S. Department of Commerce,
National Oceanic and Atmospheric Administration,
Washington, D.C., February 17, 1977.

r. Robert Eisenbud,
General Counsel, Marine Mammal Commission,
1625 Eye Street N.W.,
Washington, D.C.

Dear Bob: This is to confirm th substance of my telephone conversation with ou. I called in reference to the question whether there can be a take of a epleted species or stock under the Marine Mammal Protection Act. This issue rises because the Marine Mammal Commission, as well as other parties, rgued in briefs for MMPAH No. 2–1976 (tuna/porpoise regulations) that the astern spinner dolphin is depleted. You also argued in favor of allowing an ccidental, unintentional take of eastern spinners. There has been some confuion over the meaning of your suggestion for an accidental, unintentional take.

In our conversation, you agreed with me that once a species or stock had een declared depleted, there could be no legal taking of that species or stock ccidentally or otherwise. Thus, no permit could be issued that would allow any aking of such a species or stock. You also indicated that your suggestion of llowing for an accidental, unintentional kill of eastern spinners actually refers o an enforcement policy. In that policy, only warnings would be given to shermen who reasonably though that they were fishing on a pure school of ffshore spotted dolphins only to find that undetected eastern spinners were lso being set upon. In such cases, some kind of enforcement action would be equired because any killing of eastern spinners, even if accidental, would still e a violation of the Act. Moreover, you indicated that under your proposal. shermen who knowingly set upon a mixed school containing eastern spinners hould receive a severe penalty. Finally, you stated that you believed the use of an enforcement policy as previously suggested was the best legal argument a *de minimus* accidental take of a depleted stock.

I trust that I have been faithful to your position.

Sincerely,

HERBERT L. BLATT,
Assistant General Counsel.

Mr. EISENBUD. I should note, however, that the second point that I was referring to involves: what do you do when you determine that someone has accidentally taken an eastern spinner? That is the enforcement policy question. And that is one that is still, I think, under consideration in terms of whether there can or will be an official announcement that no one will be prosecuted. And we have not rendered that policy determination or advice in writing. I do not think the National Marine Fisheries Service has, either.

Mr. LEGGETT. Thank you very much.

Mr. Butler, do you want to ask a question?

Mr. BUTLER. Yes, Mr. Chairman.

Would a question from the floor be appropriate to Dr. Chapman?

Mr. LEGGETT. Why don't you ask me and I will ask him.

Mr. BUTLER. Mr. Alverson submitted for the record—in criticism of my testimony—some amended National Marine Fishery Service porpoise population charts, which he also submitted to the administrative law judge, in which occasional sightings outside of the established range over the last year or two have been plotted—and this is particularly with regard to the eastern spinner. I wanted to ask Dr. Chapman whether, in his expert opinion, the fact that the eastern spinners have occasionally been seen outside of their generally established range, Mr. Chairman, meant to him that their range was growing or had been underestimated in the first instance?

Mr. LEGGETT. Are you able to respond to that question?

Dr. CHAPMAN. Yes; I would be glad to respond to that question, Mr. Chairman.

This is, of course, an important matter that has been under discussion between Mr. Alverson of Living Marine Resources and the National Marine Fisheries Service and myself and others in the Marine Mammal Commission for some time.

We are looking forward to seeing the papers and information that Mr. Alverson has collected, to be able to evaluate that to see whether or not it is as he suggests—namely, an extension of range, or whether it is just occasional sightings, or perhaps the whole thing pulsates back and forth, or some other possibility. These explanations have been suggested as alternatives to Mr. Alverson's suggestion.

And the National Marine Fisheries Service has been carrying out extensive surveys with their research vessels just on this particular question, Mr. Chairman, both lost year and during the last few months.

There is also the aerial survey effort that has already been referred to, which has studied this same question. And I think you will be in a much better position after having studied Mr. Alverson's documents and having the results of these new surveys, Mr. Chairman, to be able to give a definitive answer to that.

As I say, the aerial survey will be completed within a few months. That will, again, improve the type of information base that you are going to have to work with.

Mr. LEGGETT. All right, thank you very much.

Mr. Alverson. Mr. Leggett, may I make one comment?

Mr. Leggett. I do not think he contradicted you.

Mr. Alverson. I just wanted to clarify a point. Mr. Butler said I presented this information before the administrative law judge. I presented as much of the information and as up-to-date as possible before this committee last September.

Mr. Leggett. Thank you.

OK. thank you very much. It has been very helpful.

Now my record shows that we have two witnesses left: Mr. Fensterwald and Mrs. Stevens. Do you have any choice as between you on who would like to go first?

Mr. Fensterwald. I will defer to the lady, of course, Mr. Chairman.

Mr. Leggett. I will give Mrs. Stevens another opportunity to testify then—other than as the last witness.

STATEMENT OF CHRISTINE STEVENS, SECRETARY, SOCIETY FOR ANIMAL PROTECTIVE LEGISLATION

Mrs. Stevens. Thank you, Mr. Chairman.

I will be very brief.

I testified very recently, so I will not go into extensive testimony.

Mr. Leggett. That is very thoughtful of you.

Mrs. Stevens. Well, I am glad you feel that way.

Mr. Leggett. Not that the content of your statement is not always good.

Mrs. Stevens. Well, Mr. Chairman, this is all I have, so, as you can see, it is not long.

We feel that the new regulations are a step in the right direction, but they really have not done enough for the dolphins. We have been hearing all day long that they are too strong. The fact is they are really not as strong as they ought to be, but there regulations are a help. Certainly they ought to be enforced.

There may be some modifications with relation to the spinner dolphins, if that is necessary, Mr. Chairman, to make it perfectly clear that if one dolphin, as we have heard several times, was caught by mistake, that might subject a person to the criminal penalties in the act—and that is not what we want.

Obviously, this is not the intent of the National Marine Fisheries Service or anyone else.

I would emphasize again, however, that there has been no penalty—criminal or otherwise—levied under this act, with respect to incidental killing of dolphins. So it is very difficult to see why anybody would be very worried if they caught one spinner by mistake—after they, for years, have been catching as many as 700 dolphins in a single set and never been penalized. It rather boggles the mind.

The goal must continue to be zero, Mr. Chairman. That is most important. And I believe that just as we have seen real progress this year with the *Elizabeth C.J.* crew, we will see other outstanding progress if we do not fall back and eliminate the incentive for such progress.

I think Mr. Alverson was talking about Captain Jorges' cruise. The point is, when he caught almost 1,000 tons of tuna, he only killed four dolphins. That is what we are talking about. We should no let that get away from us.

We want to stop the killing of these dolphins, and we do not wan to argue endlessly over the details of the wording of the act.

Now, Captain Madina did mention that he is able to distinguis before the actual setting, Mr. Chairman, whether there are any substantial number of eastern spinners in the school. In other words, h may not be able to distinguish that from a distance before he send out the boats, but once the boats are rounding them up, it is possible

That is a very important point.

In other words, he knows before he actually makes the set.

The eastern spinners were declared depleted because the industr has failed to abide by the law, and the National Marine Fisherie Service has failed to enforce the law.

Thus, hundreds of thousands of them have died wrongly—otherwise they would not be in a state where they had to be declare depleted.

There is one other point that is not perfectly clear from the testimony today. What is the industry going to do? Is it going to giv funds for retraining and research? Is it definitely going to provid the dedicated vessel that we heard so much about ?

Now, if 6,500 of these eastern spinners were allowed to be taken it might be well to think of the fact that to get a scientific permi to catch one would cost $200. So if you multiple the cost of th permits, if you were a scientist, for that many dolphins it would b $1.3 million.

I wonder if the industry is willing to back up its demands wit cash.

Mr. LEGGETT. Thank you very much, Mrs. Stevens.

I appreciate very much your constructive conciliatory posture.

Any questions?

If not, now we will have Mr. Fensterwald.

Mr. Fensterwald, nice to have you before our committee.

STATEMENT OF BUD FENSTERWALD, COUNSEL, COMMITTEE FO HUMANE LEGISLATION

Mr. FENSTERWALD. Mr. Chairman, thank you very kindly for allowing me to testify before you. I do not have any prepared statement.

Mr. LEGGETT. Do you want to identify your clients?

Mr. FENSTERWALD. Yes. Friends of Animals, Inc. and the Committee for Humane Legislation, Inc., both based in New York City.

Mr. LEGGETT. I have reviewed your filing—was that filed today o yesterday?

Mr. FENSTERWALD. This morning.

Mr. LEGGETT. I have looked at your conclusions, and it appears that you are not happy with these regulations.

Mr. FENSTERWALD. Mr. Chairman, I am not at all happy with them, and I am optimistic that the courts will be of the same opinion.

I think it might save time and be helpful if the motion and memorandum that I filed in court were made a part of the record.

Mr. LEGGETT. Very good. We will incorporate your pleadings i the record at this point.

[The following was received for the record:]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE FOR HUMANE LEGISLATION,)
INC.,)
)
Petitioner)
) Civil Action No. 74-1465
v.)
)
JUANITA M. KREPS, et al.,)
)
Respondents)

FUND FOR ANIMALS, et al.)
)
v.)
) Civil Action No. 75-0227
JUANITA M. KREPS, et al.,)
)
Respondents)

MOTION FOR PRELIMINARY INJUNCTION

On February 24, 1977, Robert W. Schoning, Director of the National Marine Fisheries Service, published regulations governing the taking and importing of marine mammals incidental to commercial fishing operations. 42 F.R. 12010 et seq.

Petitioner, the Committee for Humane Legislation, Inc., moves this Court pursuant to Rule 65 of the Federal Rules of Civil Procedure to grant a preliminary injunction, thus preventing the application of these regulations, and any permit issued pursuant thereto. This injunction is requested because the regulations are violative of the Marine Mammal Protection Act, 16 U.S.C. §1361 et seq. A copy of the regulations accompanies this Motion.

Unless restrained, it is anticipated that member boats of the American Tunaboat Association will rebegin their killing, injury, and "taking" of marine mammals as part of their commercial fishing operations on April 11, 1977. Petitioner seeks the protection of this Court, as there is no adequate remedy at law; no other means by which to preserve the status quo. Immediate and irreparable harm in the form of marine mammal injury and fatality will result without this Court's intervention. Upon consideration of the merits of this case, Petitioner is likely to succeed.

The Court is thoroughly knowledgeable as to all that has transpired from the inception of this lawsuit in 1974 to the promulgation of these current regulations. In light of this familiarity, a procedural history of this litigation has been dispensed with, and a discussion of the Marine Mammal Protection Act is included only as it relates to substantive objections.

Petitioner further moves that the Court schedule an immediate hearing on the Motion to provide for oral argument and questioning.

Respectfully submitted,

Bernard Fensterwald, Jr.
Fensterwald & Associates
2101 L Street, N.W.
Suite 203
Washington, D.C. 20037
(202) 785-1636

Attorney for Petitioner

Dated: March 2, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE FOR HUMANE LEGISLATION, INC., Petitioner v. JUANITA M. KREPS, et al., Respondents	)	Civil Action No. 74-1465
FUND FOR ANIMALS, et al. v. JUANITA M. KREPS, et al., Respondents	)	Civil Action No. 75-0227

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

The regulations issued on February 24, 1977 by Director Robert W. Schoning of the National Marine Fisheries Service governing the taking and importing of marine mammals incidental to commercial fishing operations fail to comply with the requirements and mandate of the Marine Mammal Protection Act, 16 U.S.C. §1361 *et seq*. The regulations fail to remedy the defects which led this Court to void the 1976 regulations in an Order of May 11, 1976, and affirmed by the Court of Appeals of the District of Columbia Circuit on August 6, 1976. In particular, Petitioner requests the Court to take note of the following and fatal shortcomings of the regulations:

1) The Act requires as a precondition to issuance of any regulations which provide for the taking of marine mammals that the Secretary be assured, prior to adopting such regulations, that the taking provided for will not be to the disadvantage of the involved marine mammals Sections 1371(a)(3)(A) and 1373(a). The Act mandates as well an optimum sustainable population for each

species of marine mammal. Thus, according to the statuatory construction, "disadvantage" must be defined as any taking that will reduce a stock below its optimum sustainable population. What has been lost in all of the "scientific" activity directed at defining optimum sustainable population (OSP) is the proposition that OSP must be at least that number of marine mammals in existence before exploitation of the tuna-porpoise relationship began. This figure is refered to as initial stock size. By the government's own figures, no major species population is currently larger than 76 percent of its initial size. 42 Fed.Reg. 12010, 12017 (March 1, 1977). Nevertheless, the regulations adopt a range of 50 to 70 percent of initial stock size as a lower bound of OSP and establishes mortality quotas for all but one stock. 42 Fed.Reg. 12016, 12017.

2) Optimum sustainable population is never quantified, but only stated in terms of a "range" of between 50 and 70 percent. This range neither meets the requirements of the Act, 16 U.S.C. §1373(d), nor the May 11, 1976 Order of this Court. The moratorium on marine mammal deaths cannot be waived until the OSP of all species and stocks is known with some degree of certainty.

3) §1362(13) defines the word "take" to mean harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. In each pertinent section of the Act, §§1371-1376, the word employed is "take" -- not kill. The Committee for Humane Legislation does not recognize that the regulation of incidental taking of marine mammals addressed in the Act is confined to reduction of "mortality and serious injury." There is no such context and such an interpretation flies in the face of the explicit language of 16 U.S.C. §1362(13), which is far more broad. The Marine Mammal Protection Act(MMPA) is infused with the intent to reduce mortality and serious injury to a level approaching zero, but also to reduce harassment, hunting, and capture and with-

out distinction as to characterizations of incidental, accidental, or deliberate. It is estimated that marine mammal fatalities as part of tuna fishing operations represent two percent of those mammals actually captured in the purse seine nets. At this rate, over four million porpoises were "taken" in 1976 alone. Under the proposed quota of 59,050 for part of 1977, approximately three million porpoise would be "taken" during this short period. §§1371 and 1372 prohibit the taking of marine mammals unless one is in possession of a permit issued pursuant to §1374. Yet, as currently drafted, the regulations address only takings which result in fatalities. Are all other takings prohibited? Are such limited regulations enforceable? Or are these regulations void as their predecessors for failure to respond to the statutory scheme?

4) Within §1371(a)(2) is the specific goal that incidental kill and serious injury of marine mammals permitted in the course of commercial fishing operations be immediately reduced to insignificant levels approaching zero. The agency has mistaken this objective as the outer limit of the Act's concern. However, even assuming that the agency is correct in its view, the regulations fail miserably. The regulations authorize a mortality quota of 59,050 for a period of 38 weeks at maximum. 42 Fed.Reg. 12018. On an annual basis, this would equal a total kill of over 80,000 -- hardly an improvement over the 1975 quota of 78,000. Five years have elapsed since passage of the MMPA and its articulation of an immediate goal of a fatality and serious injury rate approaching zero. As an absolute number or as a comparative figure, 59,050 marine mammal deaths is not within the Act's tolerance.

5) If taking is permitted, the Act requires that all such taking of marine mammals be done in a humane manner. It is incumbent upon the Secretary to determine that the manner of take involves the least possible degree of pain and suffering practicable to the mammal involved. 16 U.S.C. §§1362(4), 1374(b)(2)(B).

Yet, the regulations are silent as to this provision; there is simply no mention. Porpoises may be hunted, netted, herded, terrorized, and released a number of times in a single season, to say nothing of being ultimately killed. If death does occur, it results from the air breathing mammals having suffocated because of entanglement in the nets or drowned because of shock and injury. It is difficult to understand how such takings are "humane" by any definition of the word. Once again, the regulations fall far short.

6) The regulations are by their very nature, unenforceable. For example, the regulations set a quota of five animals for each of four different species. 42 Fed.Reg.12017. This quota is to be shared by over 130 United States vessels which set on porpoise. Suppose that, in the opening days after permit issuance, 20 different boats set on mixed schools and, as a result, each killed short finned pilot whales, of which the total mortality quota is five. The kill would exceed the quota by a large factor. Who is to be penalized? If a quota system is to be employed (and Petitioner Committee for Humane Legislation believes that such a sanctioned kill is prohibited by the MMPA), then it must be limited to reasonably populous species. If there are only 450 pygmy whales in the whole world, does the Act permit the killing of a single one?

7) Beginning on page 12020 of the Federal Register is a discussion of foreign kill. It is stated that the best available estimate of the rate of marine mammal deaths caused by foreign vessels is that contained in "the workshop report." The workshop concluded that non-U.S. kill rate for 1973-1975 was the same as the 1972-1973 U.S. average. In 1972, the U.S. porpoise kill was estimated to be 204,600; in 1973, 175,000. But then following is the confusing statement: "Since those estimated levels of kill totaling approximately 41,000 were not disputed, it is concluded

that those are the best available estimates of foreign kill. [Emphasis supplied]. On October 14, 1976, proposed regulations were published (41 Fed.Reg. 45015) of which these regulations are a final version. The proposed regulations supposedly considered foreign kill rates in setting a United States quota of 29,920 for all of 1977. The final regulations supposedly consider foreign kill rates, yet reach a U.S. quota of 59,050 for a period of only 38 weeks.

Director Schoning states, as properly he should, that in order to be insured that the total mortality of individual species and stocks will not be to their disadvantage, he has considered the estimated foreign mortality in setting U.S. quotas. 42 Fed. Reg. 12018. Just how he has used foreign mortality rates is less clear. And once again, the Act obligates him to consider not only animal deaths, but all takings.

8) A number of regulations have been promulgated pertaining to importation. Petitioner supports rigorous enforcement of the MMPA as to the activities of American and foreign vessels alike. Unfortunately, the new import regulations are unrealisitc and vague. Section 216.24(e)(1) places the focus of an importation ban upon individual fish caught in a manner not allowed within United States jurisdiction. 42 Fed.Reg. 12012. Such an emphasis may require an item by item determination upon entry to this country. The potential burden to customs officials is so large as to result in likely nonenforcement. A more realistic approach would have been to emphasize entire fleet or vessel catches or processor inventories -- violation of MMPA provisions would thus "taint" entire shipments for import purposes.

Further, fish and fish products may qualify for import upon the basis of a statement by the master of the vessel catching the fish. 42 Fed.Reg.12013. This provision is hardly a deterrent to a vessel master motivated by economic self-interest and the knowledge of doubtful U.S. jurisdiction over him for criminal proceedings. Enforcement responsibility must rest in part with the flag government of the foreign vessel.

The final and most faulty item as to the import regulations is the standard, or absence of one, by which foreign fishing activities are to be measured. Foreign fishing operations are to be conducted in conformance with United States regulations and standards or in a manner determined by the Director which does not result in mortality in excess of that which results from U.S. fishing operations. 42 Fed.Reg. 12013. Does this mean that each foreign vessel may kill and injure mammals to the extent that one U.S. flag vessel might as its percentage of the overall U.S. mortality quota, or are the boats of one foreign country permitted a quota of porpoise equal to that of the entire American fleet, or are all foreign vessels of all countries limited to an equivilant quota as that established by these regulations?

9) Within the provisions of the MMPA, and in particular the sections providing for regulations on the taking of marine mammals and the issuance of permits (16 U.S.C. §§1373, 1374), are requirements for publication, public participation, scientific consultation, periodic review, and reporting to Congress. These features are in addition to the normal requirements of federal agency rulemaking. The current regulations are the culmination of an almost 6-month administrative process. Thus, it is offensive to the intent of the Act and without textual support that the regulations attempt to reserve the right to increase the number of marine mammal fatalities at some future point in the life of the 1977 permit. "The Director may change the maximum number of marine mammals that may be killed, as specified in the general permit, whenever new information becomes available which results in the reevaluation of the population or OSP level of any stock or species." 42 Fed.Reg. 12011. Thus, the 59,050 quota is not really a quota, but an open-ended loophole.

10) Marine mammals must be managed for the benefit of their species and not for the benefit of commercial exploitation. 16 U.S.C. §1362(6). The primary purpose of the Marine Mammal Protection Act is to protect marine mammals; the legislation was not intended as a "balancing act" between the interests of the fishing industry and the animals. The legislative intent and judicial interpretation of the Act is clear and explicit in this regard. Committee for Humane Legislation, Inc. v. Richardson, 414 F.Supp. 297 at 306 and 540 F.2d 1141 at 1148. Nevertheless, a close examination of the language of the new regulations indicates a pervasive preference in behalf of maximum yield for commercial interests rather than protection and conservation of the affected mammals. In light of the mortality quota established by the regulations (59,050 for a 38 week period; over 80,000 when converted to an annual basis), a passage from page 12019 of the Federal Register becomes terribly revealing: "The economic analysis which is part of the record indicates that the imposition of a quota below 80,000 will adversely affect the profitability of purse seiners, at least in the short run." When all is said and done, this appears to have been the controlling factor in the issuance of the regulations.

In summary, the regulations are fatally defective because they fail to meet the statutory requirements of the MMPA in the following respects:

1) No present porpoise stocks are at OSP, i.e., pre-exploitation level.

2) OSP has never been quantified as required by the Act.

3) No provision is made for permits to cover the three million-plus, non-fatal "takings" anticipated in 1977.

4) A quota of 59,050 (or an annual rate of approximately 80,000) comes nowhere near meeting the immediate statutory goal of an insignificant level approaching zero...plus the fact that the quota is open-ended.

5) The method of taking is inhumane.

6) The regulations, which allow the setting on certain mixed schools, are unenforceable.

7) The regulations do not, as promised, take into account foreign killings.

8) The import regulations are so vague as to be fatally defective.

9) The regulations are for the primary benefit of the tuna industry, not the marine mammals.

For these reasons, Petitioner Committee for Humane Legislation believes that the regulations must be enjoined.

Respectfully submitted,

Bernard Fensterwald, Jr/mf

Bernard Fensterwald, Jr.
Fensterwald & Associates
2101 L Street, N.W.
Suite 203
Washington, D.C. 20037
(202) 785-1636

Counsel for Petitioner

Dated: March 2, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE FOR HUMANE LEGISLATION, INC.,
Petitioner
v.
JUANITA M. KREPS, et al.,
Respondents

Civil Action No. 74-1465

FUND FOR ANIMALS, et al.
v.
JUANITA M. KREPS, et al.
Respondents

Civil Action No. 75-0227

ORDER

Upon due consideration, it is ORDERED that the Motion for Preliminary Injunction be, and the same is hereby, set for hearing on ______________________, 1977, at __________ o'clock.

____
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE FOR HUMANE LEGISLATION,)
INC.,)
)
Petitioner)
)
v.) Civil Action No. 74-1465
)
JUANITA M. KREPS, et al.,)
)
Respondents)

FUND FOR ANIMALS, et al.)
)
v.)
) Civil Action No. 75-0227
JUANITA M. KREPS, et al.,)
)
Respondents)

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 1977, the foregoing Motion for Preliminary Injunction, Supporting Memorandum , and Order has been served on counsel of record by mailing first-class, postage-prepaid, or by hand delivery, copies of the same to:

Bruce C. Rashkow
Margaret Strand
U.S. Department of Justice--Room 2646
10th Street & Pennsylvania Ave, N.W.
Washington, D.C. 20530

William A. Butler
John Hellegers
Environmental Defense Fund
1525 Eighteenth Street, N.W.
Washington, D.C. 20036

Albert Ferri, Jr.
Glenn E. Davis
Pacific Legal Foundation
Suite 500
1990 M Street, N.W.
Washington, D.C. 20036

John A. Hodges, Esq.
Peabody, Rivlin, Lambert & Meyers
12th Floor
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

Patrick C. O'Donoghue, Esq.
O'Donoghue & O'Donoghue
1912 Sunderland Place, N.W.
Washington, D.C. 20036

David Jaffe, Esq.
Schulman, Abarbanel & Schlesinger
350 Fifth Avenue
New York, N.Y. 10001

Bernard Fensterwald, Jr./mf

Bernard Fensterwald, Jr.
Fensterwald & Associates
2101 L Street, N.W.
Suite 203
Washington, D.C. 20037
(202) 785-1636

Mr. FENSTERWALD. I would like to make two general comments in addition to those.

Very briefly, I have listened to the testimon yof the union officials here today, and I may have mentioned this at the last session and I certainly will not belabor the point, but it seems to me we are back in the same old John L. Lewis syndrome that has happened many times before in this country. I have never been able to get the exact figures, but I think we have here union officials supporting the method of fishing which has drastically reduced the number of people employed in the industry. I think the committee could probably get the exact number of tuna fishermen who were employed, say, for 1960 and the number employed today. So, it just seems ironic to me that the union officials should be here supporting spokesmen for an industry which has put a great number of its members out of work.

Second——

Mr. LEGGETT. Of course the work. I think they have increased the work for the cannery segment of the industry.

Mr. FENSTERWALD. Well, as you know, Mr. Chairman, the cannery segment depends in large part on imports, which brings me to another point.

I think that the law as it now stands would permit a virtual monopoly on the part of the U.S. tuna fishermen if the U.S. Government wanted to enforce the law. The law as it now stands, and as it will be enforced, will permit the Treasury Department to exclude from import most foreign tuna, because those countries do not live up to U.S. standards. Therefore, the U.S. tuna fleet could not have what would amount to a virtual monopoly.

Mr. LEGGETT. You mean most of the yellowfin?

Mr. FENSTERWALD. They could exclude all tuna fish from countries who use substandard methods to catch yellowfin. That is one point that the Government does not like to think about or talk about, but the act, as it is written, says that fish from countries which do not use our standards could actually be excluded. The U.S. could exclude any type of fish if it wanted to. I understand the State Department is unhappy about this, and the Treasury Department may be, but I do not understand why the tuna industry is unhappy about it.

I would suggest that the committee take a look at the law as it now stands, to see if the economic solution for the American tuna fleet does not lie in the enforcement of it as it now stands, including most imported tuna.

I have some suggested amendments. I know that Mr. Anderson said earlier he would like to have a copy. These were placed in the record, I believe, at the earlier hearing. I think it was last week, but I would certainly be glad to give Mr. Anderson a copy of these proposed amendments.

Mr. LEGGETT. Very good. If you will give them to the Chair, we will make them available to Mr. Anderson, and in the event that we determine that modifications of the law are required, we will review these.

Is it my understanding that you are seeking a modification to the Marine Mammal Act, Mr. Fensterwald?

Mr. FENSTERWALD. Mr. Chairman, we would like to see the act both clarified and strengthened, and I think that that——

Mr. LEGGETT. Amendments——

Mr. FENSTERWALD. It would be. If the act is going to be opened up, and it is not clear at this point whether it is or is not, we certainly think that it can be improved, particularly in light of the uncertainty as the law now stands.

Clarification as much as anything else.

Mr. LEGGETT. Very good.

Any questions?

Mr. Hodges, did you want to ask a question of the Chair?

Mr. HODGES. Yes, Mr. Leggett. I would refer the committee to the actual provisions relating to imports, one of which is section 102(c)(3), relating to the importantion of fish, stating it is unlawful to import into the United States any fish, whether fresh, frozen or otherwise prepared, if such fish caught in a manner which the Secretary has prescribed for persons subject to the jurisdiction of the United States, whether or not any mammals were taken incidential to the taking of the fish——

Mr. LEGGETT. Now, there is another provision, as I understand it.

Mr. HODGES. It is section 101(a)(2), saying the Secretary of the Treasury shall ban the importation of commercial products from fish which have been caught with fishing technology which results in the incidental catch or serious injury to ocean mammals in excess of U.S. standards.

The Secretary shall require reasonable proof of any nation in which fish or fish products will be exported to the United States and the effects of——

Mr. LEGGETT. It seems those bans only extend to the yellowfin tuna.

Mr. HODGES. Well, Mr. Leggett, beyond that, it is our view that this is not directed toward a broad-scale ban, but only applies to those fish that have actually been caught in excess of the U.S. standards.

The act, as it currently reads, should not be interpreted in a way that will in effect broadly curtail the flow of fish in the United States when "such fish"—the particular boatload of fish—has not been caught in a way that is violative of the regulations or standards relating to U.S. vessels.

Mr. LEGGETT. All right.

Mr. FENSTERWALD. May I comment on that, Mr. Chairman?

How, in God's green Earth, is anybody going to know whether a particular tuna fish which is caught by the Japanese and sent here, imported from Japan, was or was not caught by a boat setting on porpoise?

The only way this act can be enforced is to exclude from the United States fish from those countries which do not live up to U.S. standards.

Mr. LEGGETT. That would take an amendment of the law, though, to do that, as I read it.

Counsel says no. Do you want to read to me where that would be allowed?

Mr. SPENSLEY. Provision 101(a)(2) provides that commercial fish or fish products, not necessarily tuna but any fish that is caught with commercial fishing technology, which does not compare with U.S. standards.

So it might be fish and there might be other kinds of marine mammals. It would apply to all commercial fishing operations.

Mr. LEGGETT. What other kinds of incidental takes are there?

Mr. FENSTERWALD. The present regulations have a large section on fishing in South Africa——

Mr. LEGGETT. I do not think you could apply this to, say, salmon and say because you happen to catch a walrus in your salmon nets, that that would be a violation.

Mr. HODGES. Mr. Leggett, that is precisely the point. The question is whether the act should be construed to create a banning of all fish.

Mr. LEGGETT. I think we ought to ban all fish and all products—Mr. Eisenbud?

Mr. EISENBUD. Mr. Leggett, I do not wish to ask permission to delay this any further, but I wonder if you would hold the record open on that point, to allow opportunity for some submission of some other views?

Mr. LEGGETT. Very good. We would be glad to have all the lawyers in this room brief this matter, and it will be included in our record as appropriate appendices.

All right, we have solved this problem for today, and it has been a very interesting hearing.

I think we have all learned something.

Thank you very much.

[The following was submitted for inclusion in the printed record:]

NATIONAL WILDLIFE FEDERATION,
Washington, D.C., March 11, 1977.

Hon. ROBERT L. LEGGETT,
Chairman, Subcommittee on Fisheries and Wildlife, Conservation and the Environment, House Merchant Marine and Fisheries Committee, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your invitation to testify at the tuna-porpoise oversight hearing conducted by your subcommittee on March 2, 1977. We are using this means, instead, of conveying our views on this complex, controversial issue. Accordingly, we would appreciate it if you would include this letter in your hearing record.

As you know, the Federation has been concerned for several years about the incidental killing of porpoises resulting from yellowfin tuna commercial fishing operations in the eastern Pacific. A resolution (copy enclosed) on this subject was adopted by NWF at its annual meeting in 1975. Our concern stems largely from our interest in protecting the brood stocks of the various porpoise species and populations.

The Administration's proposed 1977 yellowfin tuna fishing regulations published on March 1, 1977 in the *Federal Register* established among other things, a total "incidental take" porpoise quota of 59,050. We understand that this figure represents the maximum number of porpoises that can be taken without causing further adverse impact on their optimum sustainable population (OSP) levels. It is our further understanding that the quota of 59,050 reflects the best judgment of scientists within the National Marine Fisheries Service, the Marine Mammal Commission and the academic community using the best data available.

Therefore, it seems to us that under the circumstances the Administration had no recourse to act other than in the manner it has to ensure that eastern spinner porpoise stocks—already at the lower limit of OSP and considered depleted—are properly safeguarded from further incidental taking. The language of the Marine Mammal Protection Act (MMPA) is quite specific in that regard. Accordingly, the National Wildlife Federation supports the regulations.

While we are sensitive to the economic implications of the tuna-porpoise issue, we remain skeptical about claims that imposition of the regulations will doom the American tuna fishing industry. Reliable statistics seem to indicate otherwise. For example, of the 70 percent of yellowfin tuna caught on porpoise, only 23 percent involved eastern spinner. Therefore, the tuna catch would be reduced about 16 percent overall, by protecting eastern spinner stocks. That reduction, while serious, would not be disastrous. Hence, the Federation is not receptive to amending the MMPA to permit an accidental take of up to 6500 eastern spinner porpoises—the key issue in this matter. In our judgment, permitting such an exception to the act—even though for one year only—would be a mistake.

Nevertheless, we acknowledge that the economic impact of being unable to set for yellowfin tuna on schools which—though not known to might, in fact—include some eastern spinner porpoises is quite serious. Thus, it is important to seek an interim solution that will, without changing the statute, ensure the continued viability of the American tuna fleet and assure the welfare of the people involved.

With that goal as an objective, the Federation is amenable to a memorandum of understanding between the government and industry concerning the *accidental taking* of eastern spinner porpoise as a result of setting on mixed schools in *1977*. The memorandum would make it clear that the government would adopt a "benign enforcement" stance relative to the prosecution of violations of the law involving the accidental taking of eastern spinner porpoise. In other words, the industry would be given every consideration in the determination of whether such taking was accidental or premeditated. It is our understanding that such a memoradum is feasible within the framework of existing law. Meanwhile, the other protective measures being proposed in the regulations, such as an increased observer program and the use of 1¼ inch mesh in the porpoise safety panel, should be implemented and fully enforced.

There is good reason to believe that the porpoise problem can be resolved shortly if it is vigorously pursued. (We would expect such a concerted effort in 1977 from tuna fishermen in exchange for a memorandum of understanding.) We are aware of, and applaud, the efforts being made by the overwhelming majority of skippers to save porpoises. Further, significant progress is being made in research cruises such as the *Bold Contender* and the *Elizabeth CJ* to develop better fishing equipment and improved operational techniques. It is incumbent on the tuna fishing industry to take the lead in these matters and to aggressively police its own ranks to eliminate the relatively few unconcerned fishermen. For it to do any less at this juncture would be extremely unwise.

In our judgment, the Congress and the Administration have gone as far as they can—and probably farther than they should have—to accommodate an industry which, until recently, has been too indifferent to a problem of growing concern to the American public. That is why the regulations, tempered at most by a memorandum of understanding as suggested earlier, should be promulgated.

Sincerely yours,

THOMAS L. KIMBALL,
Executive Vice President.

Enclosure.

KILLING OF PORPOISES

Whereas, the incidental killing of porpoises by commercial tuna fishermen in the eastern Pacific still continues at a rate well in excess of 100,000 animals a year; and

Whereas, all tuna purse seine fishing methods and procedures adopted to date and the fishery gear developed thus far has worked only to alleviate, rather than eliminate, the porpoise loss problem; and

Whereas, research has been deficient on porpoise population numbers and trends, causes of mortality, behavioral relations between tuna and porpoise, and several other aspects of population dynamics; and

Whereas, the spirit and intent of the Marine Mammal Protection Act (MMPA) of 1972 is being violated by the continued, large incidental killing of porpoises; and

Whereas, there is growing evidence that local populations and/or races of the eastern spinner porpoise (Stenella longirostris) have been especially jeopardized by such fishing activities;

Now, therefore, be it *resolved*, That the National Wildlife Federation, in annual convention assembled March 14–16, 1975, in Pittsburgh, Pennsylvania, hereby urges the National Marine Fisheries Service to:

1. Establish a specific ceiling on the annual allowable kill of porpoises incidental to tuna purse seine fishing above which the tuna fishing fleet should not be permitted to "set on porpoises," this ceiling figure to be halved each subsequent year until the kill is reduced "to insignificant levels approaching a zero mortality and serious injury rate" pursuant to Sec. 101 of MPA; and
2. Establish a greatly expanded observer program funded from a substantial increase in the fees paid by industry for certification of inclusion where the cost of the certificate is directly related to the number of porpoises killed; and
3. Pursue a more comprehensive, aggressive research program in conjunction with, and financial assistance from, the U.S. tuna industry into the entire question of porpoise-dolphin populations and their effective management.

Center for Law and Social Policy,
Washington, D.C., February 17, 1977.

Col. Milton M. Kaufmann,
U.S.A.F. Retired, President, Monitor, Inc.
Washington, D.C.

Dear Colonel Kaufmann: You have asked my views as to the applicability of the National Environmental Policy Act to a possible decision by the Maritime Administration of the Department of Commerce to approve the transfer to foreign registry of American vessels engaged in fishing for tuna in the Pacific Ocean.

Federal law requires the approval of the Secretary of Commerce—

> "* * * to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States." 16 U.S.C. § 808.

The issue of transfer of American tuna boats to foreign registry has arisen because of regulations adopted under the Marine Mammal Protection Act of 1972 to limit the number of porpoises (marine mammals) that may be taken incidental to tuna fishing operations. The Marine Mammal Protection Act applies to the activities of American citizens wherever they are carried on, including activities on the high seas.

Secton 102 (2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332, requires all agencies of the federal government to prepare a detailed environmental impact statement on "major Federal actions significantly affecting the quality of the human environment." The precise question you have raised is whether a government decision to approve the transfer of American tuna boats to foreign registry would constitute such a major federal action.

A Department of Commerce decision to approve such transfers could remove the entire American tuna fishing fleet from the jurisdiction of this country and from the operation of the Marine Mammal Protection Act. If this should occur, these vessels would be free to fish outside of United States jurisdiction without regard to any liimitations on the incidental taking of porpoise. Such fishing operations could lead to very large kills of porpoise and to consequent changes in the ecology of the ocean areas that constitute their habitat. Prior to the adoption by the Department of Commerce of regulations limiting the taking of porpoise incidental to tuna fishing, the Marine Mammal Commission established by Congress had warned that the total kill and serious injury levels of porpoise were "unacceptably high". *See Committee for Humane Legislation, Inc. v. Richardson*, 540 F.2d 1141 (D.C. Cir. 1976).

The litigation just cited was instituted by several environmental and animal conservation organizations that were concerned with the substantial harm being sustained by the porpoise population and by the consequences this would have for the marine ecosystem. Section 2 of the Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.*, set forth the Congressionail findings and declaration of policy concerning the importance of marine mammals to the environment.

In the light of the determination made by Congress in the Marine Mammal Protection Act and of the facts that have been developed concerning the consequences of unrestricted tuna fishing without regard to incidental kill of porpoise, it would seem that a decision leading to such unlimited tuna fishing would constitute a "major federal action" within the meaning of the National Environmental Policy Act. As indicated earlier, a decision to approve the transfer of American tuna boats to foreign registry could lead to widespread transfers of vessels and to their fishing without regard to the restrictions adopted by the Department of Commerce under the Marine Mammal Protection Act. Such transfers would be for the purpose of avoiding application of the Department of Commerce regulations and for the purpose of conducting tuna fishing operations free of any such restrictions.

Yours sincerely,

LEONARD C. MEEKER.

[From the World Wildlife Fund, Nov. 29–Dec. 1, 1976]

TITLE NO. 17—DEPLETION OF PORPOISE STOCKS IN THE EASTERN TROPICAL PACIFIC BY THE INTERNATIONAL PURSE SEINER FLEET

Whereas the international purse seiner fleet setting their nets around porpoise (dolphin) in the Eastern Tropical Pacific to catch yellowfin tuna have killed five to seven million porpoise since 1958;

Whereas at the October 1976 Nicaragua meeting of the Inter-American Tropical Commission it was voted by both the Commission and the subsequent intergovernmental meeting that all nations participating in this fishery have a responsibility to work internationally through the Commission to solve the problem of the incidental kill of porpoise;

Whereas the IATTC will hold a special meeting prior to July 1977 to address a specific plan to solve the problem;

The Fourth International Congress of the World Wildlife Fund, meeting in San Francisco, U.S.A. from 29 November to 1 December 1976:

Commends the member Governments of the IATTC for their action and urges them to press forward vigorously through the IATTC to achieve new techniques and fishing gear that will immediately reduce the tragic kill of porpoise and ultimately permit tuna to be caught without placing the nets around porpoise, and that all nations that use purse seines should enact legislation equivalent to the United States Marine Mammal Protection Act which sets a goal approaching zero mortality and serious injury rate for porpoise;

Further encourage the United States Government to fully enforce the Marine Mammal Protection Act, and urge the Congress of the United States to maintain the integrity of the Act, and resist all attempt to weaken it.

STATEMENT OF HAROLD F. CARY, GENERAL MANAGER—ADMINISTRATION, OCEAN FISHERIES, INC. ON MARCH 11, 1977

I. THE PROBLEM

We fish yellowfin tuna associated with porpoise schools. It is the presence of these creatures which make the fishery and its expansion possible. Without the porpoise populations the fishery would collapse for nearly all Americans engaged in it.

It is mandatory that we solve the problem of maintaining these populations, law or no law. Ultimately it is necessary that it be solved internationally.

The United States purse seine fleet, the key to the presence of tuna processors in this country, can and will continue its efforts to solve it alone and in cooperation with those in government and science qualified to assist, so long as vessels are able to operate to do so.

If the United States fleet is destroyed, no solution results. The United States fleet is out of business. A vacuum is created which will be filled by others. No porpoises are saved. No research of scale is possible.

Fishermen and environmentalists have the same goal—to preserve porpoise stocks. Neither has exclusive claim to concern despite their differing categorization. Fishermen have legitimate claim to this interest and concern because their livelihood depends upon it. Environmentalists have it because they believe it to be in the common interest. It is a shared concern.

The problem is that the fishermen believe that the problem can be solved by continuing research and continuing improvement in fishing techniques and education. Environmentalists believe it can be solved immediately or very rapidly through multiple restrictions placed upon the United States fleet.

A continuing part of the problem is that an unyielding segment of the environmentalists movement apparently does not believe that the tuna-porpoise problem can be resolved except through the dissolution of the purse seine fishery by prohibiting the fishing of tuna in association with porpoise. This does not balance the interests of mammal and man as the Congress intended.

II. THE INDUSTRY

The archives are full of data on the fishery and its importance in United States fisheries as well as the importance of tuna processing and all related support industries. This will not be repeated here.

The fishery represents the great majority of California's domestic landed value, nearly all that of Puerto Rico and some of that in American Samoa. There are landing in other areas.

Canned tuna overwhelmingly leads United States canned fish volume and value.

Thousands of persons are dependent upon the industry for employment in catching and processing tuna and by-products as well as in the entire range of activities from vessel building to final sale of tuna and by-products. This is well understood.

What is not understood by many is the vast area covered by the normal fishing operations of the United States purse seine fleet—about 6 million square miles of the Pacific Ocean and increasing. To this we have to add the countless miles fished by United States flag vessels which last year fished in the areas adjacent to Guam, Trust Territory of the Pacific Islands, New Zealand and West Africa. The Act itself covers the world wherever a United States flag vessel operates.

Also not understood by many is that in the vast area there is an enormous problem of determining population levels and that this can only be progressively determined by operation of the United States purse seine fleet. There is agreement that there is insufficient knowledge, yet interpretation of the present law forces findings on a speculative basis under enormous pressure and on a limited data base that can only be expanded by the very vessels that are being severely restricted.

III. PRESENT SITUATION

Uncertainty and confusion have been the dominant conditions in the industry. We can now add paralysis as a condition. We have faced many problems and fought them through to a conclusion that permitted continuance and expansion through development of a climate where investment capital was forthcoming. This time it is fair to say we do not know where we are going. The last court decision denying permission to fish on tuna associated with porpoise clearly fixed a climate of economic futility.

National Marine Fisheries Service has prepared an Impact Analysis of Proposed Rules which measures the distress in dismal detail. This is a view of where we are headed.

Nine vessels of our company fishing in the Eastern Tropical Pacific produced 60 percent fewer tons of tuna this year compared to the same 10 week period in 1976. This amounts to a revenue loss of about $3,000,000 based on current prices.

If the vessels cannot sail until mid April, no further production is possible and the revenue loss will have grown to $5,200,000 for the vessels by that time.

Sailing in mid April would mean no revenue to the vessel or pay checks to the crews until July.

Measures of the uncertainty and confusion are found in the twenty or more legal, administrative and other proceedings concerning tuna and porpoises in which the industry has been or is engaged in the last year. There is no end in sight.

The most recent series of hearings before an Administrative Law Judge filled 3,391 pages of testimony taken from any and all persons or groups having an interest in the matter. The decision of the Administrative Law Judge recommended a quota over 3 times greater than that originally proposed by the National Marine Fisheries Service and did not prohibit fishing mixed schools. The latest proposal of the National Marine Fisheries Service was a near Solomonic decision which came within 4% of using half the combined totals of the Judge's decision and the Service's original quota but retaining the prohibition on mixed schools fishing. Even then, nothing could be done on this until mid April which meant another 6 weeks of economic futility for the purse seine fleet.

The United States Court of Appeals took a positive step this week to permit fishermen to operate under the National Marine Fisheries latest proposal as a temporary plan.

It did so without resolving the critical problem of permitting vessels to set on mixed schools containing Eastern Spinners or commenting on the low quota on White Belly Spinners and its effects.

The industry has pointed out that a decision to allow fishing with the retention of the ban on setting on mixed schools would be a pyrrhic victory and set the stage for further economic loss.

These proceedings are now a way of life and sap the vitality of the fishery. No industry can long survive in an atmosphere of uncertainty where ability to operate is subject to month to month review and determination. Today the rules are that we cannot operate on an economically viable basis.

It is no longer a matter of how progressive, efficient or competitive we are. It is a matter of how convincing we are in these manifold proceedings. Fishing strategy is now determined by the courts and not by the skilled men who understand the sea and its inhabitants.

Because of this, the fishery cannot use the skills and knowledge of the sea and its resources, including the conservation regime.

IV. CONSERVATION, RESEARCH AND QUOTAS

What many people do not know is that tuna people are not strangers to marine science, marine scientists or matters involving marine populations and conservation of them.

The United States tuna fishery was one of the first in the world, if not the first to cause research to be undertaken on its resources long before any problems emerged.

Before there were any investigations of, or much interest in, tuna resources and their abundance, the industry urged formation of the Inter-American Tropical Tuna Commission to undertake such work. In late 1948 I appeared before the Senate Foreign Relations Committee at the time it approved the basic treaty with Costa Rica to form the Commission.

In 1949, the Commission began its work.

In 1966, seventeen years later, the Commission decided that it had sufficient knowledge of yellowfin tuna populations within an area called the Commission's Yellowfin Regulatory Area (C.Y.R.A.) and that information required a catch quota in excess of 79,300 tons for 1966. We were told that a catch in excess of 79,300 tons would begin the ruin of the fishery.

In the ten years since 1966, the amount of the quota has progressively increased. Last year at its annual meeting in Nicaragua, the Commission established a quota with an upper limit for 1977 of 210,000 tons for C.Y.R.A. area smaller than that in 1966. We now have an area which is smaller and a quota which is 165% greater than 10 years ago.

It is both evident and agreed that there is a small data base for porpoise population estimates. Inadequacies in data were deplored at the La Jolla Workshop of Experts in July 1076. The first National Marine Fisheries Service proposed 1977 quota of 29,918 porpoises (with a greater number allowed for foreign fishermen beyond United States control) was based upon a virtually certain estimate of optimum sustainable population. In laymen's terms I am advised that this means there would about 1 chance in an astronomical 1,600 of anything adverse happening to the porpoise stocks. The proposed total quota has been increased (though still subject to opposition and to the mixed schools prohibition) and therefore the odds would change.

What emerges clearly to the United States purse seine tuna fishery which will be adversely affected by the proposed 1977 quota and particularly by the accompanying prohibition of fishing yellowfin in association with mixed schools of porpoise are these things:

1. Knowledge of population is in the early period of development, but is progressing.
2. Over conservation (virtually certain estimates) is used to set quotas.
3. Time is needed to develop more useful knowledge, although progressive improvement in porpoise mortality rates should be expected in that time.
4. The United States fleet must be kept operating as the surest and only major source of developing data in that time.
5. It is possible to maintain a viable United States fishery and to reduce a porpoise mortality at the same time.

V. THE LAW

The purpose of the law as it relates to porpoises is that mortality be reduced to the lowest practicable level as quickly and effectively as possible.

Hearings records show that it was not the intent of the law to: (1) Stop tuna fishing; (2) eliminate the fishery; (3) force removal of the industry; (4) give control to the judiciary; and (5) set impossible immediate goals.

There is substantial evidence of all this. Senate Report 92–863 states:

"The Secretary for example, in regulating the operations of tuna industry with respect to the incidental catching of porpoise must consider the technical ability of these fishermen to avoid injury to porpoises. It is not the intention of the Committee to shut down or significantly to curtail the activities of the tuna fleet so long as the Secretary is satisfied that the tuna fishermen are rising economically and technologically practicable measures to assure minimal hazards to marine mammal populations."

The District Court, Washington, D.C. interpreted the Act as:

"The Act was not intended as a balancing act between the interests of the fishing industry and the animals."

This opinion meant that only environmental impact was considered by Congress and that economic impact was ignored by Congress. The hearings records do not support this intent.

The tuna fishery had some naive expectations upon passage of the Marine Mammal Protection Act. It fully expected that it would enter into a period of research and improvement in methods to reduce porpoise mortality on a cooperative, progressive basis and that progress in terms of reduced mortality rates would meet the criteria. Much of Congress was equally naive in its beliefs. Our representatives who voted for the bill believed this also. One of them stated for the record:

"The bill reported out by this Committee would set up the machinery by which a reasonably intelligent decision could be made and, certainly, assures the preservation of mammals as described in the bill, and also assures the preservation of a major industry which is a contributing factor to the economy of my State * * *."

Important legislation, like diplomacy, represents the art of the possible. This indeed becomes a series of balancing acts in a complex world with a multitude of important interests to be considered.

The responsible government agency, National Marine Fisheries Service, thought that balancing of interests was required in stating:

"We must be realistic if we establish a ceiling for 1976, recognizing our obligation to both the porpoise and the industry." That is a balancing act and it is reasonable.

The Service understood that * * * "the mandate of Congress is that the (Federal Agency) should try to reduce porpoise mortality in a way that will maintaidn a healthy United States tuna industry."

The law has been subject to differing interpretations and requires clarification. Right now it is a spring board for court challenges and delaying actions destructive to the economy and not helpful to conservation.

The administrator of the National Oceanographic and Atmospheric Administration which is responsible for the National Marine Fisheries Service stated succinctly with respect to these principles:

"I find it the height of irony that this strict regime which will so adversely affect the tuna fishery is unlikely to yield a solution to our porpoise mortality problem, but is likely to make matters worse."

The fishery did not reckon properly with those forces demanding that a solution be found immediately and arguing that this was the intent of the law. The fishery was not alone. It did not reckon at all with the power of those who urged conditions that would effectively bring about the dissolution of the fishery.

Now we need to change the law on a common sense basis to the extent that it not only requires measureable results in reduced porpoise mortality but that it recognizes that this can only be done if the United States fleet has the legal right to fish tuna in association with porpoise, subject to safeguards.

Very simply stated—the Congress holds our fate in its hands.

VI. CONCLUSION

The United States tuna fishery has worked cooperatively with and contributedly much to scientific investigations of the tuna populations for many years. Without this cooperative work by the fleet, knowledge, available to the world, would not be far advanced. These tuna stocks are in good condition.

The economic life of the purse seine vessel depends upon the preservation of porpoise populations. Development of knowledge in this field is in major part a result of the interest and contribution by the vessels in individual and cooperative research. The imposition of excessive restrictions upon the United States fleet which affect its ability to operate will eliminate what is by far the largest contribution to and means of conducting research. The porpoise stocks are not biologically depleted.

It must be understood there is no such thing as instant knowledge or instant science—in fisheries of elsewhere. Those who urge that we should know all about the sea and its resources simply exhibit that they have no experience with either one.

Progress and improvement—ability and determination are the things that count. The industry record shows that all these elements are present and provide the means to the best possible solution in the real world.

We need the help of this Committee to restore some sanity to a nightmarish situation.

Statement of Franklin G. Alverson, Vice President, Living Marine Resources, Inc., on Behalf of the American Tunaboat Association

My name is Franklin G. Alverson. I am the Vice President of Living Marine Resources, Inc., a marine consulting firm which has been on retainer to the American Tunaboat Association since 1971 to study the tuna-porpoise problem. My statement today is a very brief overview of certain aspects of this problem and will concentrate on those areas which threaten the very existence of a large portion of the fleet.

TROPICAL TUNAS—EASTERN PACIFIC

The tropical tunas of the eastern Pacific Ocean (yellowfin, skipjack and bigeye) represent a common property resource that is currently being fished by purse-seine vessels of 14 nations. The number of vessels and the carrying capacity of the international purse-seine fleet during January-February, 1977 were as follows:

Country	Number of vessels	Total carrying capacity	Percent of purse-Seine fleet
Bermuda	5	2, 469	1. 43
Canada	5	5, 296	3. 08
Costa Rica	1	350	. 20
Ecuador	29	4, 022	2. 34
Mexico	23	13, 337	7. 75
Netherlands Antilles	2	2, 494	1. 45
New Zealand	1	1, 100	. 64
Nicaragua	2	3, 800	2. 21
Panama	9	7, 980	4. 46
Peru	10	3, 760	2. 18
Senegal	3	2, 258	1. 31
Spain	6	4, 344	2. 52
United States	136	119, 670	69. 54
Venezuela	1	1, 200	. 70
Total	233	172, 080	

The tropical tuna resources in the eastern Pacific are under management by the Inter-American Tropical Tuna Commission. The Commission's membership is comprised of Canada, Costa Rica, France, Japan, Mexico, Nicaragua, Panama and the United States, eight in total.

The Commission has controlled the catch of yellowfin tuna by means of an annual quota. Over the period of 12 years the Commission has raised the allowable take from 79,300 tons in 1966 to 210,000 tons in 1977. The yellowfin stock is presently in a healthy condition.

At its October, 1976 meeting, the Commission discussed the tuna-porpoise situation in detail and instructed the Commission scientific staff to make a comprehensive review of all existing information pertaining to the problem and to report their findings and recommendations in June, 1977. That review is currently underway. At this October meeting, the Commission adopted a policy with respect to the tuna-porpoise complex that "The Commission should strive to maintain a high level of tuna production and also maintain porpoise stocks at or above levels that assure their survival in perpetuity, with every reasonable effort being made to avoid needless or careless killing of porpoise."

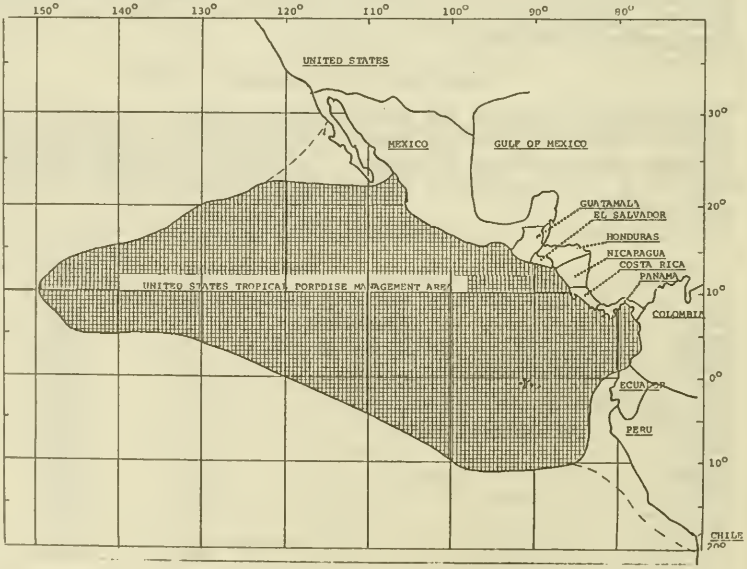
TROPICAL PORPOISE STOCKS—EASTERN PACIFIC

The various porpoise stocks found in the eastern tropical Pacific represents a common property resource. With the possible exception of Ecuador, the 14 countries fishing the area take some catch of yellowfin each year in association with porpoise. The general area of the tropical tuna fishery in the eastern Pacific is shown in Figure 1. The shaded area in the figure depicts where yellowfin tuna are taken in association with porpoise. It is vast, exceeds some five million square miles in extent and lies off the coasts of ten of our Latin American neighbors. Currently only the United States is trying to manage the porpoise stocks in this vast area.

RENEWABLE RESOURCES

Both the tropical tunas and the porpoise stocks in the eastern Pacifis represent renewable resources, and with proper management they can be harvested in perpetuity without threat to their survival. Modern management practices can ensure that society will benefit from the employment of people, the production of protein to feed a hungry world and the maintenance of healthy stocks of tunas and porpoise.

FIGURE 1



Currently the various porpoise populations found in the eastern Pacific are relatively large and according to the NMFS, none are biologically depleted nor are they being threatened by recent levels of kill. In the aggregate, the minimum number of porpoise found in the eastern Pacific exceeds 7,856,750 animals. They form a part of the ecosystem which the Marine Mammal Protection Act (MMPA) states must be maintained in a healthy state. Their impact on or their value to the escosystem are not known at the present time. We do know that they are voracious eaters and are in direct competition with the tunas and other predators for food. At a minimum, the total consumption of forage items by the porpoise exceeds ten million tons per year, about four times the annual volume landed by all the commercial fisheries of the United States.

PROPOSED TAKE—1977

The allowable take of offshore spotted (43,090), white belly spinner (7,840) and eastern spinner (0) porpoise as proposed by the NMFS threatens the very existence of a large segment of the United States purse-seine fleet. The total quota, including miscellaneous species-stocks, is 59,050 animals. The overall quota is too low, and it is distributed in such a manner that it guarantees that the take of certain species-stocks will be reached much sooner than others and this will reduce greatly the ability of the industry to fish on the species whose quotas remain unfilled.

The distribution of the allowable take will destroy the fleet's efficiency. The take of eastern spinners is set at zero and hence no mixed sets made be made on this species. The fleet is dependent to carying degrees each year, upon the ability to take tunas associated with spotted/eastern spinner mixes until August wlthin the CYRA. In the period 1974-1976, approximately 27.7 percent of the catch in this area on porpoise came from spotted/eastern spinner mixes. Outside of the CYRA, the dependence upon eastern spinners drops somewhat as the mixed schools are predominantly spotter/white belly spinner. Nevertheless, the spotted/eastern spinner mix is an important component of an economically viable fishery on the outside, contributing 11.3 percent of the tuna on porpoise in the 1974-1976 period.

The contention has been made by some that inasmuch as the quantity of tunas taken in association with eastern spinner porpoise is relatively low in comparison to the overall take of tunas, it is not important to the fleet. At recent hearings before the House, the contention was made that the take on eastern spinners might be as little as ten percent of the total take, hence it is not important. This is incorrect; it is 28 percent on the average and a spinner porpoise quota is essential to fleet viability. Approximately 95 large vessels in the fleet are responsible for the bulk of the yellowfin taken in association with porpoise. The profitability of tuna fishing is highly leveraged by volume. The inability to fish eastern spinner mixes will result in not only the loss of fish normally taken with these porpoises but also result in other losses of volume of tuna catch.

Let me demonstrate, utilizing the trip records of large seiners, 400 tons and greater carrying capacity, that carried NMFS observers in 1974, 1975 and 1976.

In 1974, 35 of these vessels had: 1,771 total sets: 22,945 tons total catch; 347 sets involving Eastern spinners (19.6 percent); and 4,332 tons catch associated with eastern spinner schools (18.9 percent).

The distribution of the percentage of catch, by vessel, was as follows:

Percent of total catch on eastern spinners:	*Number of vessels*
0 to 10	16
11 to 20	6
21 to 30	2
31 to 40	2
41 to 50	2
51 to 60	3
61 to 70	2

Thirteen vessels (37 percent) took more than 20 percent of their catch on eastern spinners. On the average, these vessels took 44 percent of their tonnage (3,510/7,970) from the eastern sponner-related schools. Without the ability to fish eastern spinner schools, these vessels could not have economically fished the area where eastern spinner mixes occur. Thus, the ability to catch the other 56 percent would have been also lost. Diversion of this effect to other areas would have increased the fishing pressure and competition for tuna and porpoise in other areas.

The pattern during 1975 was similar. Thirty large seiners which carried NMFS observers had: 1,545 total sets; 20,138 total tons; 330 eastern spinner sets (21.3 percent); and 4,658 tons of eastern spinners (23.13 percent).

The distribution of the catch on eastern spinners was as follows:

Percent of total catch on eastern spinners:	Number of vessels
0 to 10	12
11 to 20	3
21 to 30	5
31 to 40	7
41 to 50	1
51 to 60	1
61 to 70	1

Half of the vessels sampled took more than 20 percent of their catch (average 37.4 percent) in association with eastern spinners. Again, the result would have been uneconomical operations in the eastern spinner areas and a shift of effort (and concentration) on other stocks.

The year 1976 was excellent for school fish yellowfin and skipjack and, therefore, the need to fish on eastern spinner mixes does not appear as compelling as it did in 1974 and 1975. Nevertheless, the importance of eastern spinners still remains.

In 1976 a total of 60 large seiners which carried NMFS observers or gear technicians had: 2,606 total sets; 39,343 total tons; 290 sets on eastern spinners (11.1 percent); and 3,881 tons with eastern spinners (9.9 percent).

The distribution of the catch on eastern spinners was as follows:

Percent of total catch on eastern spinners:	Number of vessels
0 to 10	39
11 to 20	10
21 to 30	4
31 to 40	2
41 to 50	1
51 to 50	2
61 to 70	2

Twenty-one vessels (35 percent) took more than ten percent of their catch (average 24.8 percent) from eastern spinner mixes. Eleven vessels (18.3 percent) took more than 20 percent of their catch (average 38.8 percent) from eastern spinner mixes.

Historically, spinner porpoise (white belly and eastern), have comprised about 33 percent of total porpoise mortality each year, with spotted porpoise making up about 63 percent and the miscellaneous species the remaining four. The quota as currently proposed prohibits setting on mixed schools of eastern spinners. Based on this prohibition and the economics of the fishery, vessels will be forced to shift their operations to areas where they also can take spotted/white belly spinner mixes. At an overall mortality rate of .5 porpoise per ton (50 percent of 1976 rate) and the prohibition on eastern spinners, the United States fleet will reach its white belly quota (7,840 animals) after taking less than 50,000 tons of yellowfin associated with porpoise. This is about 40 percent of the historic catch on porpoise.

In combination the prohibition on taking eastern spinners and the very low quota on white belly spinners threatens the fleet with a direct loss in 1977 of approximately 80,000 tons of tuna that cannot be taken in association with porpoise.

We estimate that the practical effect of the current regulations will be to limit the take of porpoises by the United States fleet to: 14,967 offshore spotted; 7,840 white belly spinner; and 950 miscellaneous—total, 23,757.

At an optimistic kill rate of .5 porpoise per ton of tuna caught the fleet will take about 47,500 tons of tuna on porpoise.

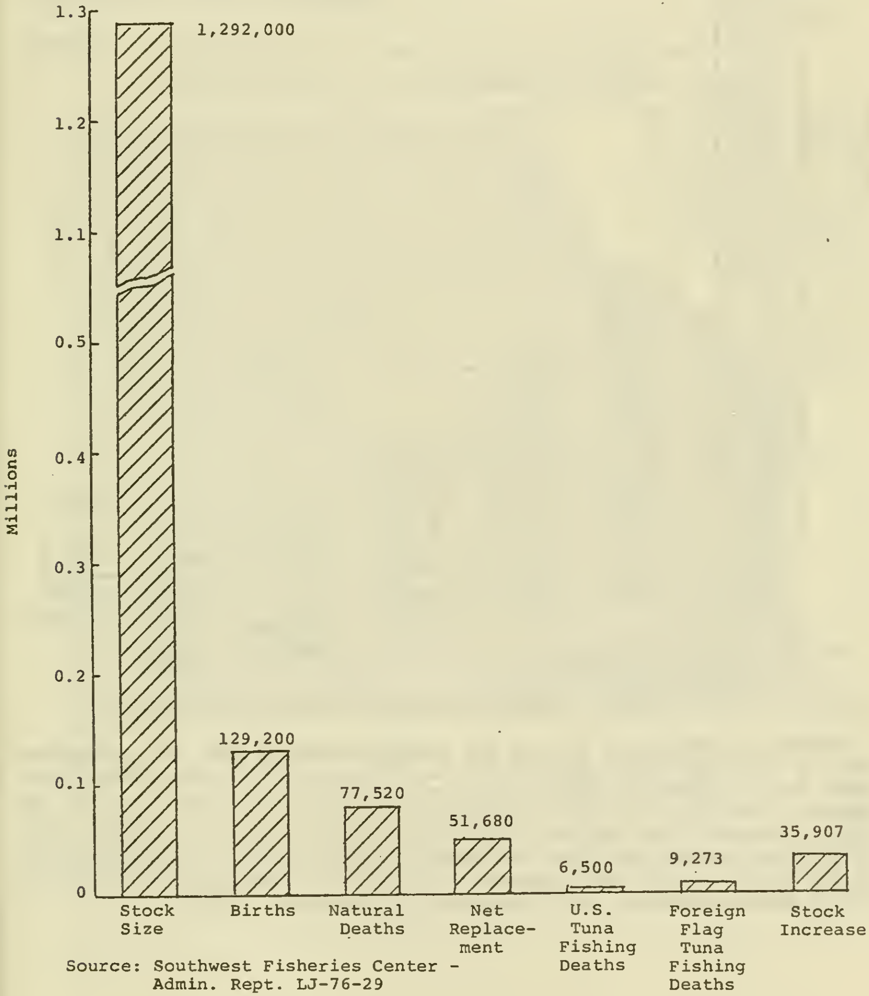
Gentlemen, it is disaster.

Based upon data produced by the NMFS, the eastern spinner population could sustain a take of some 15,773 animals (6,500 United States and 9,273 foreign flag) by the international fleet in 1977 and still realize an increase of nearly 36,000 animals (Figure 2). In the last three years, the population of this stock has increased by approximately 92,000 animals. The modest take of eastern spinners (6,500 animals proposed by the Administrative Law Judge), by the United States fleet is perfectly consistent with the theory of management of renewable resources.

According to data developed by NMFS, the offshore spotted population could sustain a take of 90,570 animals (64,393 United States and 26,177 foreign flag) by the international fleet and still realize an increase of nearly 56,400 animals (Figure 3). In the last three years, the population of this stock has increased by about 174,000. The take of 64,393 offshort spotted porpoise by the United States fleet in 1977, as proposed by the Administrative Law Judge, is perfectly consistent with the theory of management of renewable resources.

FIGURE 2

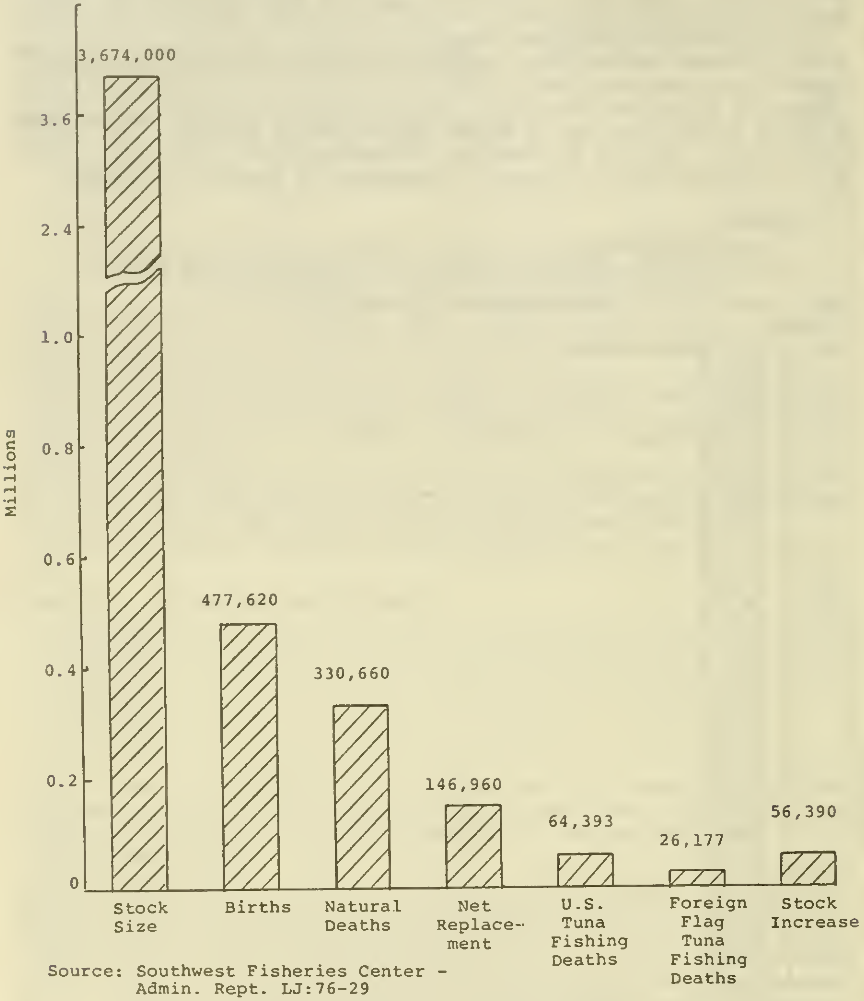
NMFS BEST ESTIMATE OF STOCK SIZE, BIRTHS, NATURAL DEATHS, NET REPLACEMENT, DEATHS AS A RESULT OF INTERNATIONAL TUNA FLEET ACTIVITY AND PROJECTED STOCK INCREASE IN 1977 FOR EASTERN SPINNER PORPOISE



Source: Southwest Fisheries Center -
Admin. Rept. LJ-76-29

Marine Mammals - Incidental Taking - Fed. Reg. Vol. 42, No. 40

FIGURE 3
NMFS BEST ESTIMATE OF STOCK SIZE, BIRTHS, NATURAL DEATHS, NET REPLACEMENT, DEATHS AS A RESULT OF INTERNATIONAL TUNA FLEET ACTIVITY AND PROJECTED STOCK INCREASE IN 1977 FOR OFFSHORE SPOTTED PORPOISE



Source: Southwest Fisheries Center - Admin. Rept. LJ:76-29

Marine Mammals - Incidental Taking Fed. Reg. Vol. 42- No. 40

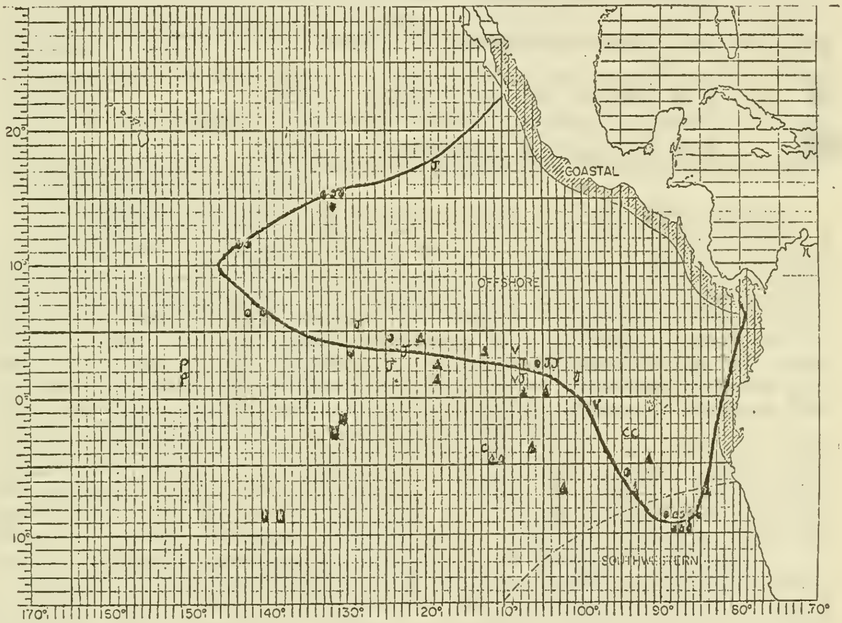
NMFS has determined that at the commencement of 1977, the population level of the white belly spinner will be at 76 percent of its initial size. Thus, there is a substantial surplus stock of white belly spinners over that required to keep the stock above the lower bounds of O.S.P. The industry feels that a portion of the surplus (9,165–19,309 animals) could be drawn on in 1977 by the international fleet. The impact of this proposed take would result in the stock of white belly spinners at the start of 1978 being 75 percent of initial size, as compared to 76 percent at the beginning of 1977.

DISTRIBUTION OF PORPOISE

The industry has contended for some time that the distributions used by the NMFS (Stock Assessment Panel) in conjunction with aerial/ship survey data to estimate the population of offshore spotted, eastern spinner and white belly spinner are too conservative. If the range of distribution utilized for these species-stocks are conservative then the populations based upon these data are underestimated. Figures 4 through 6 depict the distributional ranges utilized for the three species-stocks by NMFS to estimate population size. Also plotted are recent observations made by NMFS personnel aboard research ships or while accompanying United States purse-seiners. The observations so plotted have been restricted to those contiguous to or outside the depicted area of distributions. Further, the surveys conducted by NMFS have primarily been to the south and west of their official distributions. Fishing activity by the fleet in recent years indicates that the distribution of both the offshore spotted and white belly spinner above 10 N latitude and outside of 120° west longitude extends beyond the ranges depicted by NMFS (Figure 7). The total observations indicate, in all cases, that the distributional ranges utilized by NMFS have been very conservative.

FIGURE 4

DISTRIBUTION OF THE OFFSHORE SPOTTED PORPOISE AS DEPICTED BY PANEL OF EXPERTS AND AS INDICATED BY NMFS PERSONNEL; OBSERVATIONS PLOTTED ARE ONLY THOSE CONTIGUOUS TO OR OUTSIDE THE RANGE



Source: National Marine Fisheries Service

LEGEND

FIGURE 4

V --- R/S Vnushitel'Nyi - 1975

J --- R/S David Starr Jordan - 1976

C --- R/S Townsend Cromwell - 1976

o --- NMFS Observers and Gear Technicians on United States Seiners - 1976

P --- R/S Oceanographer - 1976

▲ --- R/S David Starr Jordan - 1977

■ --- R/S Townsend Cromwell - 1977

Statement of Mark M. Singer, President, National Food Brokers Association

Mr. Chairman and Members of the Committee, I am Mark M. Singer, President of the National Food Brokers Association (NFBA). NFBA is a national non-profit trade association representing over 2400 food broker firms who serve as the independent local sales agents for the majority of the nation's manufacturers of food, grocery, or related products, including canned tuna and seafood products. On the average each food broker represents 23 manufacturers, providing an economical and efficient sales service to each.

Food brokers are concerned that overly restrictive regulation of the United States tuna fleet fishing for tuna in association with porpoise will affect the supply of tuna to consumers. Over 50 percent of the U.S. domestically caught yellowfin tuna is in association with porpoise. Tuna is a nutritious source of protein for people. Tuna is recommended by physicians for patients in need of certain special diets. American consumers use over 1.5 billion cans of tuna annually, or a per capita consumption of 3.1 pounds. Food brokers believe that it is vital to Americans that an adequate supply of this nutritious food roduct continue to be provided.

Food brokers and the tuna fishing industry recognize the need to minimize the harm to porpoises when commercial tuna purse-seiners use porpoise with yellowfin tuna as an aid in netting the tuna.

The tuna fishing industry has made significant advances since enactment by the Congress of the Marine Mammal Protection Act in 1972. Fishermen need porpoises as guides to locate tuna. Fishermen have a vital interest in maintaining porpoise populations. Efforts initiated or further advanced have included:

1. Improving nets with Medina Panels and fine mesh aprons to aid porpoise rescue;
2. Using crew members in the nets to assist porpoises in escaping from the nets;
3. Reversing boats, "backing down" so porpoises are released as the corkline sinks below the ocean surface;
4. Establishing workshops and training sessions for tuna boat skippers.

Better fishing procedures undertaken by the U.S. Tuna fishing industry in conjunction with the National Marine Fisheries Service to protect porpoises where there is an association is estimated to have reduced the porpoise mortality rate 75 percent since 1971. Approximately 99 percent of the porpoises encircled by the U.S. tuna fishermen are released. Protecting porpoises is important to meet the requirements of the law, but to fishermen, who depend on porpoises to aid in tuna fishing, the well-being of porpoises has the added incentive of a continued livelihood. Improved fishing techniques resulting from future research hopefully will continue to preserve porpoises, nutritious tuna supplies for consumers, and a vital tuna fishing industry.

Despite advances made by the U.S. tuna fishing fleet the fishermen have become hamstrung by Court decisions of the Act and regulations that cripple the fishermen engaging in tuna fishing. Congress must act to get the tuna fishing industry at sea and fishing again. If no action is taken consumer supplies will become disrupted. Creating more workable standards that will continue to preserve porpoises and American tuna industry is necessary.

The complexity of Court decisions and subsequent regulatory processes, have, to say the least, created havoc in the tuna fishing industry. Conflicting reports concerning quota and Court decisions have ultimately resulted in tuna boat fishermen ceasing fishing and returning to port in February. For consumers the effect is, as reports indicate, a sharply reduced 1977 tuna catch.

Foreign fleets continue to fish unrestricted in association with porpoise while the U.S. tuna fleet, having made the most advances to protect porpoises, is not fishing because of regulatory restraints. If action is not taken soon, foreign fleets will catch most of the Pacific tuna quota, leaving the U.S. tuna fleet in financial distress. Porpoises will be harmed more by permitting foreign fleets to fish unrestricted without the competition of the U.S. tuna fleet. Estimates of the kill rate of porpoises by foreign vessels is approximately two and one-half times the current U.S. rate. The key to the porpoise mortality problem is a healthy United States tuna fleet.

The NMFS regulations have set a quota of zero on eastern spinner population despite the fact that the administrative law judge recommended 6,587. Unless Congress revises the Act to permit a more reasonable standard, the NMFS suggests the eastern spinner limit may not be raised until 1980, maybe later. A zero quota is unworkable when fishing in association with mixed schools of porpoises that contain eastern spinners and most experts agree that the eastern spinner population would be increasing even with a mortality limit of 6,500.

Fishing permits for 1977 are still undergoing administrative action with none issued so far. Administrative procedures must be improved to permit resumption of U.S. tuna fishing as rapidly as possible.

Congressional action now does not mean endangering research and improving fishing techniques should be a major effort. Governmental funding supporting research is an integral part of preserving porpoises and aiding the U.S. tuna industry.

In conclusion, the National Food Brokers Association urges the members of Congress to act to preserve porpoises and the vital U.S. tuna industry. As Dr. Kenneth S. Norris has said in Smithsonian magazine, "There is hope for both the porpoise and the U.S. tuna fishery. But, while better ways of catching tuna and saving porpoises are being evolved into policy or science, let's not trap ourselves into a corner nobody wants to occupy—the one where the porpoises and the fishery are both lost."

NFBA believes a healthy vigorous tuna industry is of great importance to consumers and the food industry. Relief from unreasonable restrictions is necessary so that the U.S. tuna fleet can resume operations and continue to fish tuna in association with all species of porpoises under workable standards. Amendments to the Marine Mammal Protection Act are needed to provide clear and reasonable standards which will preserve this source of food nutrition for consumers, and jobs for thousands of U.S. citizens. Whatever action is needed by Congress and the Administration to restore the vitality of the tuna industry in this country should be undertaken.

[Whereupon, at 5:40 p.m., the subcommittee was adjourned.]

MARINE MAMMAL PROTECTION AUTHORIZATION

TUESDAY, MARCH 15, 1977

House of Representatives,
Committee on Merchant Marine and Fisheries,
Subcommittee on Fisheries and
Wildlife Conservation and the Environment,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:14 p.m., in room 2220, Longworth House Office Building, Hon. Robert L. Leggett, chairman of the subcommittee, presiding.

Mr. Leggett. The meeting of the Fisheries and Wildlife Conservation and the Environment will please come to order.

On my left is one of my new subcommittee counsel, Mr. Rob Thornton.

This afternoon, the subcommittee will hold hearings on H.R. 4740, a bill Congressman Forsythe joined me in introducing, which would authorize appropriations for fiscal year 1978 to carry out the Marine Mammal Protection Act.

As I am sure all of you are aware, the Marine Mammal Protection Act was enacted in 1972 in order to insure the protection and conservation of marine mammals. The act gives the Secretary of Commerce the responsibility to implement the act with respect to whales, dolphins, porpoises, and seals.

The Secretary of the Interior is given the responsibility with respect to polar bears, walruses, sea otters, manatees, and dugongs.

In addition, the act provided for the establishment of a three-member Marine Mammal Commission, which is charged with the responsibility for monitoring the implementation of the act and conducting a review of the condition of the stocks of marine mammals and of the methods for their protection and conservation.

This act and the regulations promulgated under the act have generated a considerable amount of controversy and litigation. Most of the controversy centers around the application of the act to the fishing of tuna by setting on porpoise.

This subcommittee has considered the issues involving the tuna-porpoise problem at great length, holding 9 days of hearings on the question since the beginning of 1975, two of which were held this year.

It is my desire that we not rehash the substance of the tuna-porpoise problem at this time, but rather focus on the appropriate levels of funding needed by the various agencies and the Marine Mammal Commission to effectively carry out their responsibilities under the act.

Under section 110 of the act, there is authorized to be appropriated $2.5 million for grants to public or private institutions for the purpose of conducting research relevant to the protection and conservation of marine mammals. One-third of such grants up to $883,000 is administered by the Secretary of the Interior and two-thirds of such grants up to $1,666,000 is administered by the Secretary of Commerce.

Section 114 of the act authorizes to be appropriated $525,000 per year for the Secretary of the Interior to carry out its functions and responsibilities, and $2 million per year for the Secretary of Commerce to carry out its functions and responsibilities.

Section 207 of the act authorizes $1 million to be appropriated for the Marine Mammal Commission.

H.R. 4740 would extend the act for 1 additional year, and it would increase the appropriation authorizations under section 110 from $833,000 to $1.1 million for the Secretary of the Interior; under section 114, from $525,000 to $700,000 for the Secretary of the Interior; and from $2 million to $10 million for the Secretary of Commerce; and under section 207, from $1 to $2 million for the Marine Mammal Commission.

In addition, the bill would increase from $2 to $8 million the amount of funds authorized to be appropriated for the Secretary of Commerce to carry out its functions under section 114 for fiscal year 1977.

This substantial authorization is necessary to undertake additional research necessitated by recent court decisions in the tuna-porpoise saga, and to increase the number of observers aboard U.S. tuna vessels.

So we have scheduled for examination today Jack Gehringer, Deputy Director for NMFS, and George Milias, the Deputy Director, Department of the Interior; Mr. John Twiss is here from the Marine Mammal Commission, and he has Bob Eisenbud and Dr. Hofman; and then we have Christine Stevens, Society for Animal Protective Legislation; and Milton Kaufmann.

The legislation that we have has been introduced by myself and Mr. Forsythe, and presumably the bill includes amounts as recommended by the Department.

So, presumptively the Department would favor the legislation.

[The bill and departmental report follow:]

[H.R. 4740, 95th Cong., 1st sess.]

A BILL To increase the appropriations authorization for fiscal year 1978 and authorize appropriations for fiscal year 1978 to carry out the Marine Mammal Protection Act of 1972

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 110(c) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1380(c)) is amended to read as follows:

"(c) There are authorized to be appropriated, for the purpose of carrying out this section, not to exceed the following sums for the following fiscal years:

"(1) $2,500,000 for each of the fiscal years ending June 30, 1973, June 30, 1974, June 30, 1975, September 30, 1976, and September 30, 1977, of which one-third of the sum appropriated for any such fiscal year shall be available to the Secretary of the Interior and two-thirds of any such sum shall be available to the Secretary of Commerce.

"(2) $1,100,000, all of which shall be available to the Secretary of the Interior, for the fiscal year ending September 30, 1978.".

SEC. 2. Section 114 of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1384) is amended—

(1) by amending subsection (a)—

(A) by striking out "four" and inserting in lieu thereof "three", and

(B) by inserting ", not to exceed $8,000,000 for the fiscal year ending September 30, 1977, and not to exceed $10,000,000 for the fiscal year ending September 30, 1978," immediately after "fiscal years"; and

(2) by amending subsection (b)—

(A) by striking out "and" immediately after "June 30, 1973,", and

(B) by inserting ", and not to exceed $700,000 for the fiscal year ending September 30, 1978" immediately after "thereafter".

SEC. 3. The first sentence of section 207 of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1407) is amended to read as follows: "There are authorized to be appropriated for the fiscal year in which this title is enacted and for the next five fiscal years thereafter such sums as may be necessary to carry out this title, but the sums appropriated for any fiscal year other than the fiscal year ending September 30, 1978, shall not exceed $1,000,000, and the sum appropriated for the fiscal year ending September 30, 1978, shall not exceed $2,000,000.".

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., March 15, 1977.

HON. JOHN M. MURPHY,
Chairman, Committee on Merchant Marine and Fisheries, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to the request of your Committee for the views of this Department on H.R. 4740, a bill "To increase the appropriation authorization for fiscal year 1978 and authorize appropriations for fiscal year 1978 to carry out the Marine Mammal Protection Act of 1972."

We recommend the enactment of H.R. 4740 as it pertains to the Department of the Interior, if it is amended as described herein.

The Marine Mammal Protection Act provides for a Federal research and management responsibility over all marine mammals. The Secretary of the Interior has responsibility for sea otters, walruses, polar bears, dugongs and manatees. All other marine mammals are under the jurisdiction of the Secretary of Commerce. H.R. 4740 would extend those appropriations necessary for the Secretary of the Interior to carry out his responsibilities under the Act as follows:

Section 110(c): Research grants.
Section 114(b): General authorization of appropriations.

Section 110(c) presently authorizes an appropriation not to exceed $2.5 milion annually through fiscal year 1977 for research grants. One-third of the total amount authorized each year is available to the Secretaary of the Interior and two-thirds are available to the Secretary of Commerce. H.R. 4740 would extend the authorization for one fiscal year (FY 1978) at an amount not to exceed $1.1 million to be available to the Department of the Interior.

We recommend that section 1 of H.R. 4740 be amended to provide for an extension under section 110(c) in the amount of $833,000 for fiscal year 1978. There is a great need for detailed studies under grants from section 110(c) of near shore marine mammal communities. Effective protection and management of this resource cannot be achieved without the knowledge which is only attainable with intensive research efforts.

Section 114(4) presently authorizes a general appropriation to the Secretary of the Interior to carry out functions and responsibilities under the Marine Mammal Protection Act. Funding under this section expires with the end of fiscal year 1977. H.R. 4740 would extend the authorization for one fiscal year (fiscal year 1978) at an amount not to exceed $700,000.

We recommend that H.R. 4740 be amended to provide for an extension of the authorization under section 114(b) for fiscal year 1978 in the amount of

$525,000. The need for interagency coordination, review of environmental statements, public relations activities and the like must be met. In addition, we are experiencing higher operational costs, especially in Alaska where most marine mammal work is needed.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely,

CECIL D. ANDRUS,
Secretary.

Mr. LEGGETT. Mr. Gehringer, do you want to give us your views at this point?

STATEMENT OF JACK W. GEHRINGER, DEPUTY DIRECTOR, NATIONAL MARINE FISHERIES SERVICE, DEPARTMENT OF COMMERCE, ACCOMPANIED BY HERBERT L. BLATT AND WILLIAM P. JENSEN

Mr. GEHRINGER. Mr. Chairman, my name is Jack W. Gehringer, Deputy Director of the National Marine Fisheries Service.

Mr. LEGGETT. You are accompanied by Mr. Blatt on your right and——

Mr. GEHRINGER. Mr. Jensen of our Marine Mammal and Endangered Species Division is on my left.

It is a pleasure to appear before you today.

Mr. LEGGETT. Let us see. Your statement will appear in the record as though totally read.

Mr. GEHRINGER. I will read it because there is a slight variation from the other version.

As this committee recognizes, the events of the past year, particularly those relating to the tuna-porpoise problem, have had a major impact at all levels in the Department of Commerce, the National Oceanic and Atmospheric Administration, NOAA, and the National Marine Fisheries Service, NMFS, on efforts to implement the Marine Mammal Protection Act of 1972.

Since substantive issues directly relating to the controversy have been thoroughly addressed in the past few weeks, I do not intend to discuss them at this time except to recognize their existence and implications on our current need for funding.

Further, although there are pressing funding requirements for which we are seeking immediate relief, there are other no less urgent foreseeable needs that clearly indicate the necessity of increasing authorization limits and providing additional funding.

We are presently spending $3.455 million under the Marine Mammal Protection Act appropriated pursuant to authorizations in sections 110(c) and 114(a) that established a fiscal year 1977 limit of $3.667 million. In order to enable us to meet our commitment to the court for an enforcement plan applicable to any period the NMFS permits fishing for tuna on porpoise, the Office of Mangement and Budget has approved our request for a $1.114 million supplemental budget increase for fiscal year 1977.

Mr. LEGGETT. I presume that is also to meet the requirements of this committee as we may impose them upon the National Marine Fisheries Service?

Mr. Gehringer. Yes, sir.

This amount, if appropriated, would bring our spending under the act to the $4.559 million level for fiscal year 1977 and would enable us to place an observer onboard each large tuna purse seiner operating under our jurisdiction for at least one voyage during the remainder of calendar year 1977.

Since sections 110(c) and 114(a) authorize only $3.667 million for fiscal year 1977, an increase in that total authorization is requested as a predicate for the supplemental appropriation.

Accordingly, to cover all known needs for fiscal year 1977, including bringing under the Marine Mammal Protection Act certain marine mammal activities which we have been carrying out under authorizations contained in the Endangered Species Act of 1973 and the Fur Seal Act of 1966, a total authorization of $5.5 million is requested. For fiscal year 1978, a total authorization of $7 million will be required.

H.R. 4740, introduced by Chairman Leggett and Mr. Forsythe, would amend section 114(a) to authorize $8 million for fiscal year 1977 and $10 million for fiscal year 1978 for the Department of Commerce, as well as to amend sections 110(c), 114(b) and 207 to authorize certain amounts for the Department of the Interior and the Marine Mammal Commission.

While we have not had a sufficient opportunity to anlyze the level of funding proposed in the bill with respect to the total Federal budget, in view of our own projected needs for fiscal 1978, based on the current situation, it would appear that the levels are in excess of our current needs.

In asking for an increased authorization of this magnitude on an urgent basis, I do not wish to create the impression that our needs are solely tuna-porpoise problem related, although our experience in that arena has provided some harsh lessons on the difficulty of implementing programs when both current and past marine mammal population data are difficult and costly to determine.

Several other problem areas require our early attention, and I would like to supply some examples as broad indications of why we feel increased funding authorization is needed for the next few years.

We need to know more about the increasing competition of marine mammals with fishermen for fishery resources in areas where mammal populations reportedly are increasing in a significant fashion. Similarly, we need better and more refined data concerning incidental catch of marine mammals in fisheries other than for yellowfin tuna.

With the Marine Mammal Commission we are initiating efforts in both of these areas, and must anticipate additional funding requirements as our data needs become clearer.

In other major areas we are currently working with the Fish and Wildlife Service and the Marine Mammal Commission to improve our ability to implement this act. These are establishment of a joint Marine Mammal Marking Center and combined efforts to streamline and insure compatability in permit and enforcement approaches.

In the enforcement and marking area, we can foresee the need for increased marine mammal tagging and associated research and to broaden our at sea, port of entry, and critical habitat enforcement capabilities.

One further area of increasing responsibility under the act should be highlighted, and that is our international commitments. Besides our current commitments to such bodies as the International Whaling Commission, in support of the International Decade of Cetacean Research, and to improving porpoise mortality reduction efforts of member nations of the Inter-American Tropical Tuna Commission, we have also extended the scope of our direct marine mammal protection responsibility to 200 miles with the Fisheries Conservation and Management Act.

Although I have limited my presentation to highlights of our pressing tuna-porpoise related needs and a few of the more urgent problems in other areas, I believe we have a strong case for increased authorization levels under the Marine Mammal Protection Act.

Thank you, Mr. Chairman. I would be pleased to try to answer any questions.

Mr. Leggett. OK. I was just getting our parliamentary situation squared away.

This would be an authorization bill that relates to the current fiscal year. And as I understand, we would need a waiver, both for the authorization bill to be considered, since it is subsequent to last March 15 which, I think, was the cutoff date for consideration of appropriation bills for the current fiscal year.

Is that your understanding?

Mr. Blatt. I think so; yes.

Mr. Leggett. Now, does anybody know the status of the fiscal year 1977 supplemental appropriation bill for the Department of Commerce?

Have you made the request through channels, and is it being considered?

I notice that we have a supplemental appropriation bill coming up either later on today or tomorrow.

Mr. Gehringer. The Office of Management and Budget has approved this request for 1977.

Mr. Leggett. I understand.

And the supplemental appropriation bill which includes your funding is H.R. 4877.

Mr. Gehringer. Right.

Mr. Leggett. But I just do not see any NOAA money in there. We will have to check that out rather rapidly and carefully.

As I understand, you are asking for supplemental amounts for 1977 for two purposes.

No. 1, for the observer program and, No. 2, for research, is that right?

Mr. Gehringer. This is strictly an observer program.

Mr. Leggett. Let us see.

The $1.114 million is strictly for the observer program?

Mr. Gehringer. Right.

Mr. Leggett. For at least one voyage per vessel?

Mr. GEHRINGER. Correct.

Mr. LEGGETT. For the big ships?

Mr. GEHRINGER. Correct.

Mr. LEGGETT. And then, in addition to that, let us see, I see in the bill we provide under—on line 14, on page 2, "not to exceed $8 million for the fiscal year ending September 30, 1977."

Now, you say, "We have not had a sufficient opportunity to analyze the level of funding proposed in the bill with respect to the total Federal budget, in view of our own projected needs for fiscal year 1978, based on the current situation, it would appear that the levels are in excess of our current needs."

Did we get those numbers from you?

Is this an administration bill or is that my bill?

Mr. GEHRINGER. That is your bill, sir.

Mr. MCCLOSKEY. Would the gentlemen yield for a question?

Mr. LEGGETT. Yes.

Mr. MCCLOSKEY. Do I understand from your testimony on this bill at page 2, you would replace the sum of $8 million with the figure $5.5, and on the next line the figure $10 million with $7 million?

Mr. GEHRINGER. Yes, sir.

Those figures are adequate for 1977.

Mr. MCCLOSKEY. Does that answer your question Mr. Chairman?

Mr. LEGGETT. OK, he would replace $8 million with $5.5.

Mr. MCCLOSKEY. And $10 million with $7.

Mr. LEGGETT. And $10 million with $7 million, and now would that make it then your bill?

Mr. GEHRINGER. With those changes, that would be our proposal, yes, sir.

Mr. LEGGETT. Counsel advises me that these were department numbers and not our numbers originally, and that is why we put them in like this.

Mr. GEHRINGER. They may well have been, sir.

Mr. LEGGETT. Well, let me ask you this.

Do you have any knowledge that any of these numbers have been revised?

Mr. GEHRINGER. My understanding is that the figures that I quoted you today are the current figures of what are necessary for 1977 and 1978.

Mr. LEGGETT. OK. Well——

Mr. FORSYTHE. Mr. Chairman, will you yield?

Mr. LEGGETT. Yes, sir.

Mr. FORSYTHE. These are numbers cleared by OMB?

Mr. GEHRINGER. Yes sir.

Mr. FORSYTHE. That is the bottom line of it.

Mr. FORSYTHE. Let me just ask this then.

Is $8 million and $10 million what the agency believes that they can use unrestrained by OMB?

Mr. GEHRINGER. I think our position is——

Mr. LEGGETT. If you do not know, we will get your boss up here.

Mr. GEHRINGER. Our position is that we can probably use more dollars than we are asking for, but we can handle the requirement with these revised figures, yes, sir.

Mr. Leggett. Well, you are being a good soldier.

But let me go back and ask further, did not your agency provide to this committee your best estimate of the amount that would be required to fund each of these two sections earlier this year?

Mr. Gehringer. I am told by my staff that is correct.

Mr. Leggett. And were not those numbers the numbers that are in the bill?

Mr. Gehringer. If those are the numbers, then those are the numbers in the bill.

Mr. Leggett. All right.

And so if we—we have to presume that your official duties are regularly performed and that you had some rationale for those numbers at sometime, and I would appreciate it, obviously you are apparently limited with either what you can say or what you want to say or what your backup information is.

I would appreciate your providing to the committee full and complete backup information for the $8 million and for the $10 million.

Mr. Gehringer. Yes, sir, we will furnish it.

[The following was received for the record:]

Estimated Budgets

The numbers provided in early March to the Subcommittee without OMB review and clearance, included funding for 100 percent observer coverage on all large purse seiners. Consequently, the figures of $8 million for fiscal year 1977 and $10 million for fiscal year 1978 included the estimate for the annual cost of approximately $5 million if such an observer program proved necessary.

The following table reflects the estimated budgets for fiscal year 1977 and fiscal year 1978 upon which the estimated aauthorizations were requested:

	1977 estimate		1978 estimate	
	Original	Current	Original	Current
Current programs funded under Marine Mammal Protection Act.[1]	$3,445	[1] $3,445	[1] $3,758	[1] $3,758
Current programs funded under Endangered Species Act and Fur Sea Act	889	889	889	889
Additional tuna/porpoise observer activities	[2] 2,166	[3] 1,114	[4] 4,666	[5] 1,114
Total	6,500	5,448	9,313	5,761

[1] Includes base program of $334,000 for tuna/porpoise observers.
[2] Estimated additional amount required to implement a 100-pct tuna/porpoise observer program for one-half year.
[3] Estimated additional amount required to implement a 43-pct tuna/porpoise observer program for one-half year.
[4] Estimated additional amount required to implement a 100-pct tuna/porpoise observer program for a full year.
[5] Estimated additional amount required to implement a 25-pct tuna/porpoise observer program for a full year.

The totals shown in the table are based on more precise estimates of the various program needs and are somewhat smaller than the amounts discussed during the hearing which were developed from early estimates.

The $5.5 million and $7.0 million referred to in the testimony generally reflect the same requirements as the $8 and $10 million less the additional amounts included for a 100 percent observer program, but adding the $1,114,000 proposed as a 1977 supplemental for a partial observer program. The balance of the difference between the 1977 and the 1978 amounts represents pending adjustments to base and a budget increase for additional tuna/porpoise behavior studies.

Mr. Leggett. Now, Mr. McCloskey wants to know why we cannot put an observer on these big ships forthwith on all other cruisers?

Mr. Gehringer. Why we cannot put——

Mr. LEGGETT. He has not asked that question yet today, but I know he has asked it in the past.

Mr. GEHRINGER. Should I address that?

Mr. LEGGETT. So play like I asked it.

Mr. GEHRINGER. At the present time, our observer program is strictly a sampling program to obtain a combination of scientific data and observations with respect to the law.

We have as I understand it, two observers who are now abroad ships. There are only a few vessels out there now.

Some of the ships that have not returned are on the way in. And as I understand it, we have two additional observers prepared to go aboard.

Now, were we to place observers abroad every vessel between now and the anticipated time of the conclusion of the fishing season, this would require additional funds and additional ceilings. Our figures are based on what it would cost to take our samples during the remaining portion of the year.

Mr. FORSYTHE. Will the gentleman yield?

Mr. LEGGETT. Yes, sir.

Mr. FORSYTHE. Is the number proposed under your current plan to cover about 43 percent of the cruises for the rest of this year?

Mr. GEHRINGER. That is my understanding, yes, sir.

Mr. LEGGETT. All right.

And now the current status of your regulations, would it authorize you to place an observer on every boat on every trip?

Mr. GEHRINGER. Mr. Chairman, our plan before the court has no provision for that to take place.

As to the 43-percent coverage, our plan provides for that.

Mr. LEGGETT. That is with your plan with the court?

Mr. GEHRINGER. Yes. It does not provide for 100-percent observers.

Mr. LEGGETT. That is for 43 percent of all of the cruises of the big boats?

Mr. GEHRINGER. Yes, sir, for the sampling program. Roughly 130 to 140 vesels would be involved in the whole sampling program.

Mr. LEGGETT. How many observers would that involve?

Mr. GEHRINGER. For 130 trips it would depend upon whether an observer repeated a trip and the frequency of trips. We have 34 observers available now.

So, depending on the frequency of the trips and departures, and whether one observer could serve on more than one cruise, less than 130 observers would be involved.

Mr. LEGGETT. You say you currently have 34 observers?

Mr. GEHRINGER. We have 34 observers available.

Mr. LEGGETT. And now the $1.1 million is for more observers, is it not?

Mr. GEHRINGER. It is to provide for observers for the fishing season. We have already had a number of observers and have incurred certain costs which I cannot quote, but we can provide those.

This would provide for observers for the remainder of the fishing season.

Mr. LEGGETT. All right.

Mr. FORSYTHE. Mr. Chairman, would you yield further.

Mr. LEGGETT. Yes.

Mr. FORSYTHE. That naturally would result in about three to four times the percent of trips covered in this coming fishing season than you covered in the last season?

Mr. GEHRINGER. That is correct, on a sample basis, yes, sir.

Mr. LEGGETT. OK.

And that comes out——

Mr. GEHRINGER. Excuse me, Mr. Forsythe, not four times, but it is an increase over the previous coverage of about two and a half times.

Mr. FORSYTHE. You had about 10 to 15 percent covered last year.

Mr. GEHRINGER. We are shortening the period of the sample.

Mr. LEGGETT. Now, 34 observers goes into $1.1 million, about $32,000 per each—is that the cost of your observers?

Mr. GEHRINGER. That is an estimate of about 8,500 per trip.

Mr. LEGGETT. So if they take three trips or four trips, they make 32,000 some bucks?

Mr. GEHRINGER. Right. We are talking roughly 135 total trips at about $8,500 for observer costs per trip. But all the cost is not salaries, sir. That figure is the cost of the program.

Mr. LEGGETT. I understand that is maintenance and like that.

Mr. GEHRINGER. Yes; it represents the total cost of the program.

Mr. LEGGETT. All right.

Outside of the numbers that you preliminarily disagreed with, but now you think you might possibly agree with them at one point, do you have any other objections with the legislation?

Mr. GEHRINGER. No, sir.

Mr. LEGGETT. All right.

Mr. Forsythe.

Mr. FORSYTHE. If we were to pass this authorization and were able to persuade the Appropriations Committee to follow our guidance, it would be a welcome measure.

Mr. GEHRINGER. An additional authorization would create no problem in that we would be able to request appropriations for a 100-percent-observer program without seeking additional authorization from this committee. However, additional appropriations are not required at this time above the current requested amount. If a 100-percent-observer program becomes necessary, we will seek the required funds at that time.

Mr. FORSYTHE. I think that is all the questions I have, Mr. Chairman. Thank you.

Mr. LEGGETT. Let me ask this question before we get to Mr. McCloskey.

Will the expanded observer program concentrate on those tuna vessels that have had the most difficulty reducing their take on porpoise?

Mr. McCloskey at the last hearing referred to some information that he had, I think, three or four vessels were responsible for very large percentage of the take of porpoise last year. Our latest information indicates that 5 vessels, including the *City of San Diego* and the *Marietta*, were responsible for 45 percent of the porpoise mortality in 1976.

With all of your computers over there and the availability of the laws, have you had an opportunity to verify any of this information?

Mr. GEHRINGER. I am unaware of it. I am not sure whether the appropriate people have had that exact information.

Mr. LEGGETT. That is correct, that five ships took 45 percent?

Mr. JENSEN. Of the observed sample?

Mr. LEGGETT. Of the observed sample.

Mr. GEHRINGER. Not the total.

Mr. LEGGETT. And five trips accounted for 45 percent of the mortality of the observed sample, and how many trips were taken in addition to those five trips?

Mr. GEHRINGER. This is based on a total of 55 trips.

Mr. LEGGETT. And this would be 55 ships presumptively, right?

Mr. GEHRINGER. Correct.

Mr. LEGGETT. So that one-tenth accounted for 45 percent of your sample?

Mr. GEHRINGER. Remember, sir, our sampling program is not designed to specify a particular ship by name. It is to obtain a sample which provides a cross section of what the fleet is doing. We have not attempted to place observers on particular vessels on any other selection basis.

Mr. LEGGETT. All right.

Mr. McCloskey.

Mr. McCLOSKEY. What is the GS level of an observer?

Mr. GEHRINGER. GS-5 and GS-7.

Mr. McCLOSKEY. A GS-5 is paid how much?

Mr. GEHRINGER. Roughly $9,000 to $10,000.

Mr. McCLOSKEY. What is the period of training necessary to make that individual a competent observer capable of distinguishing the number of porpoise in a set determining the number injured and killed?

Mr. GEHRINGER. The training period is 3 weeks, sir.

Mr. McCLOSKEY. Under the present law, are you entitled to charge as part of the application fee for boats seeking licenses to fish on porpoise the cost of the observer program?

Mr. BLATT. Mr. McCloskey, we have looked into that, and at this point in time under the existing legislation, we do not believe that is possible.

Mr. McCLOSKEY. Now, wait a minute.

Do you exact a fee from the applicant for a fishing license?

Mr. BLATT. Yes, that is for administrative costs, yes, sir.

Mr. McCLOSKEY. Under your mandate to enforce the Marine Mammal Protection Act, what is different about the cost of an observer program from the other administrative costs?

Mr. BLATT. Mr. McCloskey, there are several cases that we feel limit the ability of the administration. To assess a fee to benefit the entire program, there are some cases which say that the person receiving the license is the person who should pay an appropriate fee based upon his benefit, and it is not for the entire program. That is a public cost.

Now, we feel that that should be specific in the legislation if the Congress so wishes that to be the case.

Mr. McCloskey. You have submitted a bill which I believe Senator Hayakawa has introduced in the Senate, S. 373, and there you suggest no change in language which would permit assessing the charge against the industry, do you?

Mr. Blatt. Mr. McCloskey, I do not have the bill before me. But I think that there is language in that bill that does address this matter specifically, sir.

Mr. McCloskey. Excuse me, Mr. Chairman. I do not want to bring up the whole tuna-porpoise question——

Mr. Leggett. I appreciate that.

Mr. McCloskey. However, as I suggested to the committee, if we can pass emergency legislation to assist the Russians and the Koreans to continue fishing, we can do so for our tuna industry. If we were to enact such legislation, would you want to amend the OSP because spinners are 10 percent below OSP?

Mr. Gehringer. Yes.

Mr. McCloskey. Would you want to permit the observer cost to be levied against the industry or only have the option to do so?

Mr. Blatt. I believe, Mr. McCloskey, you are addressing the provisions of the so-called Hayakawa bill. I do not believev that the administration has proposed any such legislation at this time.

Mr. McCloskey. The administration might not have, but the Department of Commerce has requested we sponsor legislation prepared by your office. That perhaps may not be the administration bill, but what I am referring to as the Hayakawa bill.

Are all of the amendments the Department of Commerce would like to the Marine Mammal Protection Act contained in the Hayakawa bill?

Mr. Blatt. We could not say, Mr. McCloskey.

Mr. Gehrinder. We will be pleased to try to address that question though.

Mr. McCloskey. I will just terminate my question with this request of you.

By Monday of next week, could you submit to committee staff language of amendments ot the Marine Mammal Protection Act which would permit assessing the cost of the observer program to the industry through the process of issuing a license to a boat on a per trip basis?

This would allow you to hire an observer for every boat during the balance of fiscal 1977, and would permit us to require that any foreign fishing boats delivering tuna either to the United States or to a U.S. cannery have a certificate showing their compliance with U.S. regulations. We would require an observer satisfactory to the U.S. on every foreign boat or perhaps an international observer licensed under the American Tuna Commission.

Could we have that kind of technical language from you by next Monday with the understanding it is not an administration provision.

Mr. Blatt. We will provide you with that information, sir.

[The following was received for the record:]

A BILL To amend the Marine Mammal Protection Act of 1972 in connection with the incidental taking of marine mammals with commercial fishing

Be it enacted by the Senate and the House of Representatives of the United States in Congress assembled. That

Section 1. Paragraph (2) of subsection (a) of section 101 of the Marine Mammal Protection Act (86 Stat. 1031; 16 U.S.C. § 1371(a)(2)) is amended by deleting the following sentences:

"The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards."

and adding the following sentence in its place:

The Secretary of the Treasury shall ban the importation of commercial fish or products from fish unless the vessel from which such fish were caught provides a certification from the Secretary that an authorized agent with the functions provided for in section 111(d) (research, observation and monitoring) accompanied the vessel on the trip in which the fish were taken and the fish were not caught with commercial fishing technology which results in an incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards. The Secretary shall establish and charge a reasonable fee for the placement of such agents aboard vessels attempting to import commercial fish or products from fish. The fee charged may include all or part of the cost of the placement of such agents aboard vessels. Such fees shall be deposited by the Secretary in a manner similar to that in section 104(g)(2) except that the fees may be used to pay the costs incurred in obtaining this certification.

Sec. 2. Subsection (g) of section 104 (86 Stat. 1036; 16 U.S.C. § 1374(g)) is amended to read as follows:

"(1) The Secretary shall establish and charge a reasonable fee for permits issued under this section. A fee charged for permits issued with respect to the incidental taking of marine mammals may include all or part of the cost of agents placed aboard such vessels under section 111(d) of this title.

"(2) All fees for permits issued under this subsection shall be deposited in a separate account or accounts which may be used to pay directly the costs incurred under section 111 of this title and in connection with the issuance of said permits, to repay or make advances to appropriations or funds which do or will initially bear all or part of such costs, or to refund excess sums when necessary: Provided, That said receipts may be credited to a working capital fund otherwise established by law, and used under the law governing said funds, if the fund is available for use by the Secretary for paying said costs. Acts appropriating funds for the purposes of this title may include provisions limiting annual expenditures from said account or accounts."

Sec. 3 Subsection (d) of section 111 of the Marine Mammal Protection Act (86 Stat. 1042; 16 U.S.C. § 1381(d) is amended to read as follows:

"If the Secretary determines that a reasonable probability exists that a commercial fishing vessel subject to the jurisdiction of the United States will engage in the incidental taking of marine mammals in the course of tuna fishing operations, whether or not a permit or certificate of inclusion has been issued to the owner or operator of said vessel under this title with respect to said taking, a duly authorized agent of the Secretary may, after timely notice to the owner or operator of said vessel, board and accompany said vessel on such trip for the purpose of conducting research, observing fishing operations, and monitoring for compliance with this Act and with regulations and permits issued thereunder. Such research, observation, and monitoring shall be carried out in such manner as to minimize interference with fishing operations. The Secretary shall provide for the cost of quartering and maintaining such agents. No master, operator, or owner of such a vessel shall impair or in any way interfere with the research, observation, and monitoring being carried out by agents of the Secretary hereunder."

Mr. McCloskey. Thank you.

No further questions.

Mr. Leggett. It is my understanding that the administration is working on some legislation in the general subject area, and when they have determined a position, perhaps this Committee may choose to hear it.

In the meantime, I would hope that we could keep the rest of this legislation as uncomplicated as possible. I do believe, though, that we should have an adequate amount authorized in the bill for a full observer program should it determine at a later time that we are able to miplement that program for either the current fiscal year or later.

So the question would be, if $1.1 million will satisfy 43 percent of the projected number of trips remaining in fiscal year 1977, which would be different than calendar year 1977, would $2.5 million be an adequate number to cover 100 percent of the trips for the balance of 1977?

Mr. GEHRINGER. I would be happy to furnish that information. I honestly do not know.

[The following was received for the record.]

PROJECTED COSTS OF OBSERVER PROGRAM

There is some uncertainty at this time regarding the number of fishing trips in 1977 because of the large number of vessels now in port. If we assume that they will all return to full fishing activities in April, and a 100 percent observer program is instituted, the total cost of the observer program for FY 1977 would not exceed $2.5 million.

Mr. LEGGETT. The answer to that would be probably yes?

Mr. GEHRINGER. Yes.

Mr. LEGGETT. OK.

Now, let us see, Mr. Akaka, do you have any questions?

Mr. AKAKA. Thank you, Mr. Chairman.

The amount of money that is being appropriated, what percentage of observers will that provide for the fleet that will be fishing?

Mr. GEHRINGER. Of the remaining trips that we anticipate for this calendar year the percentage is 43 percent.

Mr. AKAKA. Do you—is it necessary to provide more than that?

Mr. GEHRINGER. Our sampling program is designed to get information on what is happening. Of course, the larger your sample, the better information you have.

However, we feel that 43 percent is a good number for the sampling purposes. Now, to determine what goes on in every vessel, of course, it is not, but for a sample, it is.

Mr. AKAKA. Congressman McCloskey asked the question about training, and the answer was that they train for 3 weeks.

Mr. GEHRINGER. Yes, sir.

Mr. AKAKA. Are these people who have not had experience with the sea, or with fishing, or are these people—or are there requirements that they must have knowledge of the sea?

Mr. GEHRINGER. These are mostly college students, graduate students, who may or may not have had experience.

Mr. AKAKA. So it is not a requirement?

Mr. GEHRINGER. No, sir.

Mr. AKAKA. I am just worried about that, whether the 3 weeks of training of a person who maybe has not had any fishing experience doing an adequate job. I just question that.

Mr. MCCLOSKEY. Will the gentleman yield?

Mr. AKAKA. Yes, sir.

Mr. McCloskey. I discussed this matter with half a dozen tuna skippers last week and about the only thing they would accept was 139 Hollywood starlets aboard their ships.

Mr. Akaka. Yes, as I said, I question that. Because fishing was a sport of mine, and I can see after fishing many years, I still have a lot to learn.

I just wonder, I have not had reports from the captains about this, but I just wonder whether the captains are questioning some of the reports that are coming from the observers.

Mr. Gehringer. These students are all observing what is happening. They are not participating in the fishing operations, and I am sure that the captains, at times, question the judgment of a number of the observers.

Mr. Akaka. Can you tell me what the function of the observer is on board a fishing vessel?

Mr. Gehringer. Mr. Jensen will answer that.

Mr. Jensen. Their function is basically to observe the operations. They have a set pattern of information that they record, identification of the marine mammals that are chased, circled, killed; they count by species. They take biological samples of the mammals taken, and they generally participate in all of the routine shipboard activities, such as keeping the ship clean, and mess duty.

Their general instructions are to be up when the crew is up, and be active when the crew is active.

Mr. Akaka. Is that person under command of the captain?

Mr. Jensen. No. he is not. Only to the extent that he is aboard the vessel is he under the jurisdiction of the captain.

Mr. Akaka. But he still does duties of the ship?

Mr. Jensen. He has his own independent research duties to carry out, but he does participate in the routine duties aboard ship when possible.

Mr. Akaka. Have you had any complaints from the ship captains about observers?

Mr. Jensen. Only in very rare occasions.

Mr. Gehringer. Sir, we have had a number of observers who go out for one trip and do not wish to sign aboard again. It is a long time at sea, particularly if you are not accustomed to it; it is difficult.

Mr. Akaka. Thank you very much, Mr. Chairman.

Mr. Leggett. Thank you, Mr. Akaka.

Mr. de la Garza?

Mr. de la Garza. No, sir.

Mr. Leggett. All right

Now, let me ask you this.

When you go to Managua, or places like that, do you take observers with you, or do you use observers?

Mr. Gehringer. Yes; observers can accompany the delegation. Actually, they are referred to as advisors, rather than observers, in these situations.

Mr. Leggett. Under the current law are you authorized a travel and per diem for official observers?

Mr. Gehringer. Not for official observers. There is a provision in the enabling legislation of several of the treaties to provide for payment of a portion of their expenses such as travel, for usually from three to five of the advisors who accompany the delegation.

On some of the treaties this is on the approval of the Commissioners, others are on the approval of the entire advisory group. In some there is no provision.

Mr. LEGGETT. Would you object to a provision being included in this act which would provide for per diem and travel expenses for official designated observers, persons designated by NMFS or the State Department to counsel on the specifics of the fishing agreement, and also the specifics of the Marine Mammal Protection Act?

You indicate that you have specific authority for some paid observers on some agreements.

Mr. GEHRINGER. Some of the advisers, yes, sir.

Mr. LEGGETT. Now, would you object to an authority who would allow you to designate some official observers—we have not determined yet how many—to assist in negotiation on all agreements that interrelate with the Marine Mammal Protection Act?

Mr. GEHRINGER. We would have no objection to the same framework of payment of a portion of the expenses of the official delegation advisers, as is done at present in three treaties that I am familiar with.

Now, we must, though, defer to the Department of State, because that is an area that they finance. However, this does take place with respect to three of them but it does not with respect to the IATTC, or the Halibut Commission, and a couple of others.

Mr. LEGGETT. These observers are officially helpful to you?

Mr. GEHRINGER. Yes, sir.

Mr. LEGGETT. Well, Counsel, I want you to go ahead and see that something is drafted along that line, that we can consider when we mark up this legislation. If you understand me.

Let us see, Mr. Mannina, do you have any questions?

Mr. MANNINA. Mr. Trible, perhaps, would like to question first.

Mr. TRIBLE. I have no questions.

Mr. LEGGETT. Oh, I am sorry.

Mr. MANNINA. Jack, following up from the chairman's request as to how you would expend these moneys if they are fully appropriated, can you give us a 5-year projection of your estimated expenditures under the Marine Mammal Protection Act?

Mr. GEHRINGER. Not here, but I would be pleased to furnish it.

[The following was received for the record:]

ESTIMATED EXPENDITURES FOR MARINE MAMMAL PROGRAM ACTIVITIES[1]

[In thousands of dollars]

	1977	1978[1]	1979[1]	1980–82[1]
Grants to States	0	$200.0	$575.0	$575.0
International program	0	0	245.0	245.0
Enforcement[2]	$1,075.7	875.7	875.7	875.7
Administration	K 313.5	313.5	413.5	413.5
Tuna-porpoise research	K 1,152.9	1,358.9	1,658.9	1,658.9
Tuna-porpoise observers	[3] K2,500.0	[3] K5,000.0	[3] K5,000.0	[3] K5,000.0
Cetacean research and pinniped research	627.8	627.8	1,192.8	1,192.8
Support	830.1	937.1	937.1	937.1
Total	6,500	9,3130	10,898	10,898

[1] Subject to budget request approvals and appropriations.

[2] Includes contracts with States. Does not include 1977 limit of $600K (SK) approved for aerial enforcement of tuna vessels.

[3] Provisions for 100 pct observer coverage.

Mr. MANNINA. With respect to the expenditures, could you indicate with which States you have entered cooperative enforcement agreements, how much money has been contracted for with each State, and if you have evaluated the effectiveness of each program, could you submit that for the record?

Mr. GEHRINGER. Yes, sir.

[The following was received for the record:]

MARINE MAMMAL PROTECTION ACT ENFORCEMENT CONTRACTS

State	Fiscal year					
	1974	1975	1976	1976T	1977	Total
Alaska	152,400	172,800	172,800	43,200	172,800	714,000
California	96,000	96,000	96,000	24,000	96,000	408,000
Florida	60,000	78,000	78,000	19,500	78,000	313,500
Washington	45,000	48,000	48,000	12,000	48,000	201,000
Oregon	42,000	48,000	48,000	12,000	48,000	198,000
Louisiana	24,000					24,000
Mississippi	18,000					18,000
Alabama	18,000					18,000
Georgia	18,000					18,000
South Carolina	18,000					18,000
Total	491,400	442,800	442,800	110,700	442,800	1,930,500

Mr. MANNINA. Could you also submit for the record a copy of the Department of Commerce's audits of the marine mammal enforcement program which was completed earlier in 1976?

Mr. GEHRINGER. Yes, sir.

[The following was received for the record:]

In addition to the Department's report of audit, we are also inserting in the record our own, rather extensive reports of the State enforcement contracts concerning evaluation, justification, need, policy and recommendations.

[Committee note.—The material was labeled "For Official Use Only" and was consequently placed in the files of the subcommittee.]

Mr. MANNINA. With respect to the return of management, can you submit for the record report as to the status of return of management application of Alaska, and if the Department does return management, whether you would project expenditures of any funds under section 109 to the State?

Mr. GEHRINGER. Yes, sir.

[The following was received for the record:]

STATUS REPORT ON ALASKA'S WAIVER REQUEST

Regarding Alaska's request for a waiver of the moratorium and return of management of nine species of marine mammals, hearings were held on June 29 and 30 and July 1, 1976, in Anchorage, Alaska; July 6-9 in Nome; July 12 and 13 in Bethel; July 14-20 in Anchorage; and September 21 and 22, 1976, in Washington, D.C. Briefs were filed by the parties on January 7, 1977, and reply briefs on March 1, 1977. The ALJ's recommended decision is expected in early May. If the State of Alaska does assume management responsibility for the nine species requested and implements an acceptable management program, the funds now being used for the enforcement contract will be used to fund the Federal share of the program. We are anticipating that the State of Alaska program will be about $400,000 of which the Federal share would be not more than $200,000.

Mr. MANNINA. Could you also indicate the nature and extent of subsistence taking which is occurring in the State of Alaska.

Mr. GEHRINGER. Yes, sir.

[The following was received for the record:]

ESTIMATED NATIVE SUBSISTENCE TAKE OF MARINE MAMMALS 1973–76

	Ringed seals	Bearded seals	Spotted seals	Ribbon seals	Bowhead whales	Grey whales	Total
Year:							
1973	6,000–9,000	1,760–2,640	240–360		37	0	8,037–12,037
1974	4,500–6,000	1,320–1,760	180–240		20	1	6,021–8,021
1975	6,080	1,760	160		15	0	8,015
1976	4,550–5,225	1,750–2,125	700–850	<50	48	0	7,980–8,298
Total	21,130–26,305	6,590–8,285	1,280–1,610	<50	120	1	29,171–36,371

Source: Data compiled from Alaska Department of Fish and Game statistics.

Mr. MANNINA. Could you also indicate if you are presently utilizing SK funds for implementation of the Marine Mammal Protection Act, if so, what is the projected use of SK funds?

Mr. GEHRINGER. Yes.

[The following was received for the record:]

SK FUNDS FOR IMPLEMENTATION OF THE MARINE MAMMAL PROTECTION ACT

A one-time use of Saltonstall-Kennedy funds not to exceed $600K has been approved for the interim tuna-porpoise aerial enforcement program. We hope to avoid repeating this emergency funding situation. As a result of interim authority granted by the court to extend the 1976 permit and certificates, the aerial enforcement program has been terminated. Approximately $80,000 of the SK funds were spent.

Mr. MANNINA. One final question.

You indicated that the cost of an observer was $8,500 per trip. Does that include salary, quartering, insurance, the full range of expenses?

Mr. GEHRINGER. Yes.

Mr. MANNINA. It does.

Thank you, Mr. Chairman.

Mr. LEGGETT. So he does not get a flat amount of $8,500 per trip?

Mr. GEHRINGER. No.

Mr. LEGGETT. All right.

I am glad he cleared that up.

Now, the amount that you are asking for, or that we are asking for, does the Marine Mammal Commission participate in your budget at all, in helping to arrive at a figure?

Mr. GEHRINGER. You mean in arriving at a budget figure?

Mr. LEGGETT. Yes.

Mr. GEHRINGER. They advise us periodically regarding things that they feel we should be increasing our expenditures on, however, they do not get involved in the actual formation of the plan.

Mr. LEGGETT. This $10 million we have in here for 1978, for your budget, and $8 million for 1977, all of which you do not think you can use, for the record, is that fund the flights of the airplane from the United States down to South America when you figure out how many seals there are in the Southeastern Pacific Ocean?

Mr. GEHRINGER. Seals?

Mr. LEGGETT. I mean porpoise. These funds are for surveys——

Mr. GEHRINGER. Yes, sir.

Mr. LEGGETT. That brings up a question then. You indicate that you do not think you could use the amount of money that we have in this bill, and yet, from previous testimony, we know that you will make one pass over the ocean, and observe .0001, and I am being generous, of the ocean surface in this area, and you will then project from that the number of various kinds of porpoise that are out there.

Is it not rather obvious that you could use extra money to observe .0002 or .0003 of the ocean, and get all that much more reliable data to give to this committee, and to us as a base to promulgate your regulations?

Mr. EHRINGER. I think there is always the opportunity to better use the dollars we have, plus use additional dollars to get better data. I think that is without question. But at this present time we feel that our 1977 and 1978 needs can be met.

Mr. LEGGETT. All right.

I think if that is all the questions the members have, that is all we have for the moment, and it is very helpful to the committee.

Thank you.

Mr. LEGGETT. All right, is Secretary Milias here?

All right, Mr. Secretary, nice to have you back before the committee so soon, and we have got your formal statement which you have prepared to support, at least I believe you do.

Yes; your statement of seven pages will be included in our record at this point.

[The statement follows:]

STATEMENT OF GEORGE W. MILIAS, DEPUTY DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

Mr. Chairman, I appreciate this opportunity to appear here today. The Marine Mammal Protection Act provides for a Federal research and management responsibility over all marine mammals. The Secretary of the Interior has responsibility for sea otters, walruses, polar bears, dugongs and manatees. All other marine mammals are under the jurisdiction of the Secretary of Commerce.

I will address only the extension of authorization for appropriations necessary for the Secretary of the Interior to carry out his responsibilities under the Act.

Section 110(c) authorizes an appropriation not to exceed $2.5 million annually through fiscal year 1977 for research grants. One-third of the total amount authorized each year is available to the Secretary of the Interior. There is a great need for detailed studies of near shore marine mammal communities. Effective protection and management of this resource cannot be achieved without the knowledge which is only attainable with intensive research efforts.

The Fish and Wildlife Service's marine mammal research activity is administered through the National Fish and Wildlife Laboratory located in the National Museum of Natural History. In addition to the research coordination and administration provided by the National Fish and Wildlife Laboratory, we have field research stations located in Anchorage, Alaska, Gainesville, Florida and Monterey, California.

Most of our research efforts are currently done within the Service. However, we also utilize contracts and cooperative agreements with other agencies and organizations which are designed to enhance the ongoing research activities and to help meet short term information needs. In addition we administer a small number of research grants.

I will not take this Committee's time to discuss all of our research projects, but I would like to give you an idea of some of the studies we are conducting.

Our polar bear research activities, are quite extensive and include the tracking of bears using satellite telemetry. Studies are underway to determine parasites and environmental contaminants in polar bears. We are also investigating the movement and interaction of polar bear groups between the Alaska coastal and Arctic Ocean populations.

For walrus our current research efforts include determining the ecological relationships among ice breeding walrus and seals and to determine parasite and environmental contaminants in walruses.

Sea otter studies include determining the biology and management needs for the California sea otter, determining the interactions between sea otters and other aquatic species along the Alaska and California coast, and determining annual and seasonal movement, abundance and composition of populations of sea otters and other marine mammals in Prince William Sound, Alaska.

Research on manatees include continuing studies on stranded manatees, development of manatee tagging and tracking technology, determination of the role of the manatee in the aquatic ecosystem, and determination of the distribution and status of all taxa and populations of manatees.

Dugong research has been limited to studies on distribution, abundance and population trends.

The funding authorization for marine mammals research reflects the specific information needs to provide a scientific basis for decisions under the Marine Mammal Protection Act. After a working session review and subsequent discussions of the Service's marine mammal research program with the Marine Mammal Commission, they made specific recommendations on our program and suggested that a long-ranged plan be developed.

Such a plan has been developed. It will provide the basic data for population and ecosystem models that will enable us to predict the consequences of any proposed management action on the marine mammal environment. The required research will be conducted by in-house research projects augmented by cooperative studies with foreign countries and with personnel from other Federal agencies, State agencies and universities funded through grants.

Specific research needs that have been identified include expanded work on the California sea otter and Hawaiian monk seal, further development of an ecosystem approach to understanding on the manatee in Florida and adjacent areas, and the accumulation and interpretation of data on environmental pollutants. The new research thrust will also include manatees in Central and South America, as well as West Africa; studies of the dugong, especially in connection with development of super ports and increased shipping activities; and investigations of oiling of marine mammals, with special emphasis on those marine mammals that occur in areas where oil spills seem highly likely in the near future.

In a very recent development the Service and the National Marine Fisheries Service have agreed to cooperatively establish a marine mammal tagging project. The project will provide in the Fish and Wildlife Service a single centralized clearinghouse and information center for all marine mammal tagging operations and stimulate research and development of new tags and tagging techniques.

In addition the Service is involved with the U.S.S.R. in the study and management of marine mammals under the Agreement on Cooperation in the Field of Environmental Protection. The marine mammal projects are developed to provide collaborative research on the biology, ecology and population dynamics of marine mammals of mutual interest to both nations.

Section 114(b) authorizes a general appropriation to the Secretary of the Interior to carry out functions and responsibilities under the Marine Mammal Protection Act. Current funding of $525,000 under this section expires with the end of fiscal year 1977. Funding under Section 114(b) is utilized by the Service in three general areas. They are: administration, permit processing and enforcement and protection.

As you know, Mr. Chairman, the Marine Mammal Protection Act, provided a broad moratorium on the taking of marine mammals. The moratorium must be lifted if the taking of any marine mammal—other than for display, scientific research, or for native Alaskan handicraft, clothing and subsistence purposes—is contemplated. In addition to lifting the moratorium, regulations governing the taking of the species must be issued. The waiver process requires certain specific procedures to be followed, among them the conduct of a hearing "on the record" in the process of prescribing regulations.

The State of Alaska submitted to the Departments of the Interior and Commerce a request to waive the moratorium on nine of the 28 marine mammal species in Alaska. Three of the nine species are under the jurisdiction of the Department of the Interior—polar bears, walruses and sea otters.

On April 5, 1976, the Director of the Service published final regulations governing the taking and importation of Pacific walrus managed by the State of Alaska. Publication of the Director's approval of State laws and regulations, along with promulgation of the new Federal regulations affected return of management of the Pacific walrus to the State of Alaska.

Currently the U.S. Fish and Wildlife Service and the National Marine Fisheries Service are jointly considering the request for waiver of the remaining marine mammal and have issued a draft environmental impact statement covering all species requested. The statement was filed with the Council on Environmental Quality on March 5, 1976.

Consideration of the waiver has involved public hearings which were held in Alaska in July of 1976 and in Arlington, Virginia, in October 1976. Briefs have been filed with the Administrative Law Judge and we expect his recommendations in April. The final environmental impact statement and the determination regarding the extent that a waiver may be granted, and whether State laws and regulations are consistent with the purposes and policies of the Act, should be completed by June of this year.

In 1974, the State of California submitted a request to waive the moratorium and return management responsibilities for the sea otter to the State. In 1976, the Director of the California Department of Fish and Game withdrew the waiver application and requested instead a scientific research permit and the return of management under Section 109 of the Act. Both requests are under consideration at this time.

The Act requires that an annual report be submitted to the Congress and to the public on the current status of all marine mammal species and population stocks subject to the provisions of the Act. This report describes those actions taken and those measures believed necessary, including, where appropriate, the issuance of permits pursuant to the Act to assure the well-being of such marine mammals. Mr. Chairman, I have a copy of our most recent report for submission to the record.

The Act provides that permits may be issued for taking and importation of marine mammals for scientific research purposes or for public displays. Since 1974, 56 marine mammal permit applications have been processed by the Service. The permit issuance process is a continuing requirement and one that is rather involved. In addition to the validity determination, permit applications are reviewed by the Marine Mammal Commission and require field review and investigations to insure that the applicant's facilities are adequate to house and provide for the marine mammal. Any required special conditions are added to the permit form if it is decided a permit is to be issued. We anticipate continuing requests for marine mammal permits.

Between July 1974 and September 1976, our enforcement and protection efforts have resulted in 349 investigations under authority of the Marine Mammal Protection Act. During the same time period 251 of these investigations were terminated. Approximately 100 of these investigations were referred to National Marine Fisheries Service for further action bcause they involved species under the jurisdiction of the Department of Commerce. Of those investigations conducted by the Fish and Wildlife Service, approximately 90 percent involved either walrus or polar bears.

The Service plans to increase its efforts in screening all wildlife importations, both at designated and nondesignated ports of entry for illegally imported marine mammal products. In addition, law enforcement agents of the Service are continually gathering and assessing information about possible violations of the Act. Enforcement agents maintain surveillance of areas known to be inhabited by marine mammals in order to detect suspected violations involving the illegal taking of these species. In situations where these activities indicate a suspected violation an investigation is made.

As you can understand our activities are varied and intensive under the Act. We urge that H.R. 4740 be amended to authorize the Secretary of the Interior an appropriation in fiscal year 78 of $833,000 under section 110(c) and $525,000 under section 114(b). This is the amount included in the President's budget. A one year authorization will give the new administration time to review the future of this Public Law. Without such an extension we will be unable to continue carrying out the Act.

This concludes my prepared statement Mr. Chairman. I would be pleased to answer any questions you might have. Thank you.

Mr. LEGGETT. The bill that we have before us, as I recall, has a supplemental amount. It has $2.5 million authorized for 1973, 1974, 1975, 1976, and for the current fiscal year of which one-third of the sum appropriated for any fiscal year shall be available to the Secretary of the Interior, and two-thirds of the money shall be available to the Secretary of Commerce.

So the question is how much does that raise your current authorization? Currently you get one-third of $2.5 million, is that correct.

STATEMENT OF GEORGE W. MILIAS, DEPUTY DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY RUPERT BONNER, MARINE MAMMAL COORDINATOR, OFFICE OF WILDLIFE ASSISTANCE; CLYDE JONES, DIRECTOR, NATIONAL FISH AND WILDLIFE LABORATORY, DIVISION OF RESEARCH; CLARK BAVIN, CHIEF, DIVISION OF LAW ENFORCEMENT; AND DON DONAHUE, WILDLIFE PERMIT OFFICE

Mr. MILIAS. Yes.

Mr. LEGGETT. That is $833,000?

Mr. MILIAS. That is correct.

Mr. LEGGETT. All right.

So essentially, this bill then is doing nothing for 1977. Is it changing the numbers?

Why do we restate that section, just because they are restated in the total provision of the bill?

Mr. MANNINA. Yes.

Mr. LEGGETT. So that your testimony does not relate to any supplemental in 1977. It relates essentially to increasing this amount for 1978 to $1.1 million, is that right?

Mr. MILIAS. It relates to extending the authoriaztion at the existing level for one year.

Mr. LEGGETT. Just for the Department of the Interior?

Mr. MILIAS. Yes; it is our feeling that a 1 year authorization will give the new administration time to review just where they want to go in this area, and without the extension, of course, we would be unable to continue our present efforts under the Act.

Mr. LEGGETT. Let me see, if I did not state it, your statement will appear in the record as though fully delivered.

Mr. MILIAS. Yes, Mr. Chairman.

As you know, we only are involved with sea otters, walruses, polar bears, dugongs and manatees.

We have continuing research in all of those areas.

I have accompanying me, from the Service, Rupert Bonner, Marine Mammal Coordinator; Clyde Jones, Director of the National Fish and Wildlife Laboratory, and Clark Bavin, Chief of the Division of Law Enforcement and Don Donahue, of our Wildlife Permit Office.

They are the individuals who are chiefly responsible for carrying out the various provisions of the act.

Most of our research efforts are carried out within the Service, however, we do utilize some contracts and cooperative agreements with other agencies and organizations which are helpful in this regard.

In addition, we administer a small number of research grants in the area. I do not think it is essential to take up the committee's time on all of our research projects, but I will give you an idea of some of the things that we are involved in.

Our polar bear research activities are quite extensive, and include the tracking of bears using satellite telemetry. Studies are underway to determine parasites and environmental contaminants in polar bears.

We are also investigating the movement and interaction of polar bear groups between the Alaska coastal and Arctic Ocean populations.

We are also involved in research on the walrus, and sea otter studies are part of our activity. Of course, as you know, otters are a concern along the California coast, in particular, and to some degree along the Alaskan coast.

Our research on manatees is also continuing, and this species, in particular, seems to be in great difficulty at the present time.

Also, with respect to dugongs——

Mr. LEGGETT. Are my colleagues aware of what a dugong is?

What does a dugong look like?

Mr. MILIAS. I have never seen one. Maybe one of the staff with me can describe a dugong.

Mr. LEGGETT. Maybe we are administering a species that we cannot identify.

Is there any of your staff that can identify a dugong when they see one?

Mr. MILIAS. Clyde Jones can.

Mr. LEGGETT. How about your law enforcement man back there? Can you recognize a dugong?

Mr. BAVIN. I am not sure I can.

Mr. LEGGETT. That is a suspicious laugh on your face. But can you recognize a dugong?

Mr. JONES. Yes, sir.

Mr. LEGGETT. Essentially what does it look like?

Mr. JONES. It looks like a large torpedo. It has a fluke shaped tail, it has a small head with huge and folding lips. It is a large gray torpedo shaped animal.

Mr. LEGGETT. What is the total population?

Mr. JONES. We have no idea. The dugong occurs in the Indo-Pacific Ocean.

Mr. LEGGETT. In the Indo-Pacific Ocean?

Mr. JONES. Yes, sir.

Mr. LEGGETT. How many have been seen in the Pacific shores?

Mr. JONES. The greatest population we know of is off the Great Barrier Reef, Australia, again we do not know precisely its size.

Mr. LEGGETT. Have we ever seen any in American waters?

Mr. JONES. In the Pacific Trust Territories, there are records of dugongs in the area of Palao, they are found as far north as Guam.

Mr. LEGGETT. If you ever find any, they will be protected.

Now, the manatees, now I have seen one of those that was sick down at Florida one time.

Mr. Milias. Yes.

Mr. Leggett. So I can recognize those.

What is the—how large a population do we have of those?

Mr. Jones. Approximately 1,000 animals in Florida.

Mr. Leggett. Are there many down there?

Mr. Milias. That is the only place they are known to occur in the U.S. They also occur in South American waters, and also off the coast of West Africa.

Mr. Leggett. If we engaged zero based budgeting on this item of 1.1 million for 1978, Mr. Secretary, how would you defend your budget?

Mr. Milias. That is a very difficult question, Mr. Chairman.

Mr. Leggett. It is an easy question, $1 million is not much to defend. What are your people doing?

Is that split up over so many people that you cannot figure out exactly what they are doing in this particular regard?

Mr. Milias. Well, it is split up in many activities including research, law enforcement, permits and administration.

However our activities under the Marine Mammal Protection Act are only a small portion of all the activities and species the Fish and Wildlife Service is responsible for.

Mr. Leggett. Good.

Well, when you go back to your office, what I want you to do is give this challenge to one of your subordinates, and have him present to this committee a justification in about five pages, or maybe 10, of this entire million dollar item, and if it is bits and pieces of things, I want to know the bits and pieces, and how we got there, and let us be able to show it.

You know, we never zero based anything in the billions, or the multibillions, but little bitsy items like this, you see we stomp on you, and make you squirm. That is the idea of zero based budgeting, is that the smallest gets smaller, and I want to know if you are really doing anything in this program there, how many full time people you have any place in this program, how many part time people, and what protections you are giving to each of the species, and how you figure the apportionment of the law enforcement activity, and the darting and the other kinds of radioactive devices that you are inclining that you track with the satellites, and of course, with this kind of a budget, I presume that you get all of your satellite service free from some other agency.

Mr. Milias. Mr. Chairman, I would like to clarify one position. We are not supporting the $1.1 increase in Section 110.

Mr. Leggett. You are not?

Mr. Milias. No, we are supporting the $833,000 existing level.

Mr. Leggett. Well, the $833,000 is what you had last year, is it not?

Mr. Milias. Yes.

Mr. Leggett. And it is what you had the year before last?

Mr. Milias. Yes.

Mr. Leggett. And what you had that year before last?

Mr. Milias. Yes.

Mr. Leggett. And it is what you had in 1974?

Mr. MILIAS. We were authorized $400,000 for research in 1974.

Mr. LEGGETT. Well, are you reducing your program?

Mr. MILIAS. No, as I said originally, we feel that there is going to be perhaps a new approach in this area by the administration, and that we will mark time with our $833,000 at the present moment, until we see just where the new administration desires to go with it.

Mr. LEGGETT. Very good.

I do not want to you to zero base something that you do not fully defend. But would you fully defend the $833,000?

Mr. MILIAS. Most certainly.

Mr. LEGGETT. That you have spent for the last 5 years, and tell us why you have been able to spend exactly the same amount, and do apparently what you consider to be an adequate job, and the Department of Defense seems to require, let us see, they have a 19 percent increase in the procurement budget this year.

Mr. MILIAS. I think you will find probably, Mr. Chairman, that not only did we spend the $833,000, I think from what I studied the last few days about the subject matter, that we probably use funds from overlapping authorities.

Mr. LEGGETT. So what you do, you innocently reprogramed from other activities without redoing too much accounting for it?

Mr. MILIAS. Some of the authorities are overlapping and benefit the same species.

Mr. LEGGETT. OK.

Well, let us find out if we need anything in this. Maybe you can borrow the whole amount, or maybe we need to double the amount. But I think we should do a study, and we do not want to spend $833,000 to do the study.

As I say, make it not more than 10 pages.

Mr. MILIAS. OK.

[The following was received for the record:]

QUESTIONS OF THE SUBCOMMITTEE ANSWERED BY GEORGE W. MILIAS

We are pleased to respond to questions that were generated by the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the Merchant Marine and Fisheries Committee during the recent hearings on extension of funding authorization under the Marine Mammal Protection Act of 1972.

We have provided a funding table that indicates the Service's past, present and anticipated expenditures on marine mammals. You will note that we had a small research effort underway prior to the passage of the Marine Mammal Protection Act, under provision of other authorities. Our research activities were increased significantly as new requirements, in the area of management and protection, were placed on the Service. These latter requirements are in three major areas—program administration, law enforcement and permit processing.

The projected 1978 fiscal year figures are consistent with the Administration's budget which is currently under consideration in Congress. The projected 1979 fiscal year figures, are approximately 30 percent above current expenditures. We propose to utilize the increase to: (1) take care of recent inflation, (2) increase our coordination and monitoring efforts, and (3) expand our research program particularly in regard to California sea otters, manatees and dugongs.

The projected increases for fiscal years 1980–1983 are necessary to fully implement mandates of the Marine Mammal Protection Act.

In addition to the general budget questions several specific questions were also asked during the hearing on March 15, 1977. The questions and the responses are as follows:

Question. How many full-time people in the program? (page 45, lines 23-24)

Answer. For the most part Service employees involved in the Marine Mammal Protection Act are permanent full-time employees. For example, we have 12 PFT employees in our research effort. However, we have used man-years in the summary table as it more accurately portrays our efforts. For example, many of our enforcement agents may spend only a part of their time on marine mammal activities. There are no agents assigned full-time to marine mammal enforcement.

Question. How many part-time people anywhere in this program? (page 45 line 24)

Answer. Most of the individuals involved in the marine mammal program are full-time. However, we do fund some 14 part-time personnel in our law enforcement effort as port inspectors responsible for examining import and export shipments. We will be adding about 10 to this number in the near future.

Question. What protection is given to each species? (page 45, lines 24-25)

Answer. The Service's protection for marine mammals varies somewhat depending on the species. However, they all are covered by the basic provisions of the Marine Mammal Protection Act, which placed a moratorium on their taking except for native subsistence hunting and scientific research and public display collecting by specific permit. In addition to our law enforcement efforts to prevent unauthorized taking and importation of marine mammals products, protection of the species is achieved through scientific research studies to gain knowledge of the species. Other laws also provide direct or indirect protection such as the Endangered Species Act and the National Environmental Policy Act. The Service has designated the California sea otter as threatened, the manatee and dugong as endangered. This action provides for identification of critical habitat for the listed species and further supports the prohibition against taking except under permit for specified purposes. Identification of critical habitats for the manatee has been completed.

The effectiveness of our protection efforts. as a result of the Marine Mammal Protection Act and other statutes, is best indicated by the following examples: (1) the polar bear population now appears to be stabilized with limited subsistence harvest in Alaska, (2) walrus in Alaska have become reestablished within their historic range and their population appears stable, even with subsistence harvest by natives.

Although the California sea otter was recently listed as threatened, the population is increasing and extending its range, not only in California, but in other areas within its historic range.

Question. How does the Service apportion its law enforcement activity? (pages 45-46, lines 25-1)

Answer. The Service directs its law enforcement activity to areas where the resource is provided the greatest protection for funds expended. For example, there is an illegal trade in walrus ivory. To have our enforcement agents in the field patrolling the vast areas where walrus are found throughout the year would not only be ineffective but would also be prohibitive in terms of cost. We feel our efforts are far more effective at ports-of-entry where such illegal items would enter the country. By reducing the incentive to take walrus for their ivory, protection is afforded the species.

For other marine mammals which are not of commercial value such as the manatee, a different strategy is employed. Most direct mortality is a result of boating activities. We have posted known concentration areas with warning signs and worked with local authorities in publicizing the presence of manatees and the need to reduce high speed boating.

Question. How are you able to track polar bears using satellite telemetry? (page 46, lines 1-2)

Answer. Our efforts to track polar bears using satellite telemetry were initiated through a research contract let in fiscal year 1976 to produce three radio transmitters which would be placed on polar bears for tracking with the Nimbus F satellite. We plan to test the transmitters on animals in the field during fiscal year 1977 to determine the actual feasibility of the system.

Question. How does the Service continue meeting the mandates of the MMPA with no increases in funding? (page 55, lines 6-7)

Answer. Some activities which are desirable and non funded must be postponed in order to remain within the ceiling. For example, the number of research contracts funded by the Service has decreased significantly since fiscal year 1976. While we view these contracts as very valuable adjuncts to our own in-house research efforts, the level of funding available for research efforts will not maintain all requirements.

The Service has supplemented funds appropriated under the Marine Mammal Protection Act from funding available under the broader Fish and Wildlife Act authorization. The majority of these funds represent our marine mammal research effort conducted prior to the Marine Mammal Protection Act and therefore have not required reprogramming to continue.

Question. What is your total number of enforcement personnel? (page 55, line 11)

Answer. The Fish and Wildlife Service currently has a total of 209 permanent full-time personnel assigned to law enforcement, this includes special agents and port inspectors.

SUMMARY
U.S. FISH AND WILDLIFE SERVICE
MARINE MAMMAL PROGRAM
FY 1969 – FY 1983
($000)
(Man-years)

Activities	FY 68	FY 69	FY 70	FY 71	FY 72	FY 73	FY 74	FY 75	FY 76	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82	FY 83
A. Research	91 2.0	106 2.0	116 2.0	123 2.0	132 2.0	149 2.6	449 6.0	1,008 10.0	1,000 11.8	950 14.8	950 15.5	1,127 17.5	1,339 17.5	1,425 17.5	1,510 17.5	1,557 17.5
B. Permits	---	---	---	---	---	---	9 .6	11 .6	12 .6	14 .6	16 .6	18 .6	20 .6	22 .6	24 .6	26 .6
C. Administration	---	---	---	---	---	---	10 .5	40 1.5	60 2.5	108 3.5	113 3.5	125 3.5	136 3.5	150 3.5	166 3.5	183 3.5
D. Law Enforcement	---	---	---	---	---	---	300 11.0	365 12.0	400 12.1	460 12.5	460 12.5	660 14.3	765 14.3	840 14.3	925 14.3	1,020 14.3
Subtotal B,C,&D							319 12.1	416 14.1	472 15.2	582 16.6	589 16.6	803 18.4	921 18.4	1,012 16.4	1,115 18.4	1,229 13.4
TOTAL A,B,C,&D	91 2.0	106 2.0	116 2.0	123 2.0	132 2.0	149 2.6	768 18.1	1,424 24.1	1,472 27.0	1,532 31.4	1,539 32.1	1,930 35.9	2,230 35.9	2,437 35.9	2,625 35.9	2,786 35.9

4-11-77

Mr. LEGGETT. Mr. Forsythe?

Mr. FORSYTHE. Thank you, Mr. Chairman.

On a level budget basis, the financial support of the program has declined very substantially over the years because of inflation.

Mr. LEGGETT. Unless they have been stealing more from other agencies.

Mr. FORSYTHE. That was my next area and I think that is evident without an answer. But in fact the enforcement officers are enforcing a wide range of statutes?

Mr. MILIAS. Yes.

Mr. LEGGETT. Therefore, the part of their time that is necessary or directly related to your responsibilities under this act are not quantified, really.

Mr. MILIAS. They might become involved in this act, or they might, in the very same day, be enforcing another act.

Mr. LEGGETT. If the gentleman will yield.

We are just playing games. If they do not know how much enforcement activity is in here, we are just kind of playing games authorizing these amounts, and appropriating these amounts.

It goes into a lump sum, and we do not really know how it is spent out.

Mr. Forsythe. I am sure the chairman is not recommending that we have separate enforcement officers.

Mr. Leggett. No; we ought to have just one. But I question whether we need separate authorization on these things, unless they can defend.

Mr. Forsythe. I appreciate that

I think that is all I have.

Mr. Leggett. Mr. Hughes?

Mr. Hughes. No questions, Mr. Chairman.

Mr. Leggett. Mr. Akaka?

Mr. Akaka. Yes, Mr. Chairman.

Maybe you do not need the $833,000; is that correct?

Mr. Milias. I can not agree with that statement, sir. I think the things that we are doing under the act, activities we have been mandated to do, would not be done without specific funding for such activities.

So if we are told do not do this any more, we do not. It would be impossible to conduct our whole program without any funding under the act.

Mr. Akaka. We have, over a period of years, total amount has been about the same, $833,000. Has their surveys, research been about the same each year, without any appreciable cost increase?

Mr. Jones. I think it is only fair to say that the research end of it, that the rising cost and inflationary budget results in a smaller research, less extensive research program.

Mr. Akaka. Thank you, Mr. Chairman.

Mr. Leggett. Thank you, Mr. Akaka.

I just want to state this: In view of the fact you have had this leeway, so-called stealing privileges, from other budgets, if we gave you $1.1 million, it is well likely that that we might cure your habit of stealing.

I say that in the broad general sense, but it might not result in any modification of your program.

Mr. Milias. I think maybe, Mr. Chairman, I ought to rephrase my statement.

We do try to effectively manage our marine mammal program and we must recognize that overlapping authorities do exist. I did not intend to imply that we were overtly stealing funds from other programs, simply because we were on a flat appropriation from year to year. I do not know that to be the case at all. But I do know that when dollars are scarce, you try sometimes to do the best you can with what you have.

Mr. Leggett. I know exactly what you are doing, and there is no way that you can change the image of the Chair.

Mr. Trible?

Mr. Trible. Thank you, Mr. Chairman.

So far we have been discussing section 101 appropriations; have we not?

Is there not a request for additional appropriations in the bill, section 114?

Mr. Leggett. Now, we covered that under the other agency.

Mr. Mannina. Both agencies.

Mr. LEGGETT. Both agencies are under that.

Mr. TRIBLE. I think we ought to discuss that, too, Mr. Chairman.

Mr. LEGGETT. Did you have a question on that?

Mr. TRIBLE. I think the question is appropriate. I asked if that is not the case, and I think the answer is "Yes," and if it is, then I was going to direct your attention to page 2 of the bill, line 22, which deals with section 11, and ask you about those appropriations, and ask you to respond to my question.

Mr. MILIAS. Page 2, line 14?

Mr. TRIBLE. Line 22, sir.

Mr. MILIAS. I have it here.

Mr. TRIBLE. It is my understanding that requests have been made for $700,000, section 114.

Mr. LEGGETT. As opposed to $525,000 in your administrative budget for the past 4 years.

Mr. MILIAS. We are proposing $525,000 for fiscal year 1977; not the $700,000 contained in the bill.

Mr. TRIBLE. All right, sir.

Initially I think the figures that were supplied by your Department, were for $700,000, and thus that is the figure in the bill. But now the figure is for $525,000.

Mr. MILIAS. That is correct.

Mr. TRIBLE. Which was consistent with past years.

Mr. MILIAS. Yes.

Mr. TRIBLE. And for what purposes are those moneys spent?

Mr. MILIAS. They are integral parts of the whole program.

I think maybe I will ask Rupert to give you the segments, the pieces—Rupert Bonner.

Mr. BONNER. We use about $25,000 for the Permits Office, issuing permits for marine mammals. About $100,000 of that is used for administration, processing of waiver applications, hearings, making reports to the Congress, which the act makes us responsible for, and there is about $400,000 of that goes to law enforcement, under section 114.

Mr. TRIBLE. All right.

This is all one program, is it not, 114 and 110?

Mr. BONNER. I do not know what you mean. One program?

Mr. TRIBLE. We discussed heretofore your request for $833,000 which is pursuant to section 110. Are those funds put to a different use and purpose than the $525,000 we are now discussing?

Mr. BONNER. Yes. Under 110, it is earmarked only for research.

Mr. TRIBLE. All right, sir.

Mr. BONNER. Section 114(b) is for administrative purposes, which can be divided into the broad areas which I just described to you.

Mr. LEGGETT. If the gentleman will yield.

Is your law enforcement out of the administrative numbers?

Mr. BONNER. Yes, sir.

Mr. LEGGETT. All right.

Mr. Trible.

Mr. TRIBLE. All right, sir.

And this is an identical figure, as to that appropriated in years past?

Mr. Bonner. Yes, sir.

Mr. Trible. How is it that you can do today at the same costs what you did several years ago?

Mr. Bonner. It is apparent we sacrifice in certain areas. The cost of manpower goes up, our effort has to go down. So therefore we have enforcement people doing enforcement work across the board with marine mammal funding paying a smaller portion of their salaries.

Mr. Leggett. Let us see, we are going to get that information comprehensibly when we get our zero based analysis.

Mr. Trible. That is what I was leading up to, Mr. Chairman.

I was hoping that perhaps we could address these questions at the same time.

Mr. Leggett. We will. Necessarily, we want to include this total item of $833,000 and $525,000 to find out exactly what they have done, and how they have done it in each of the years, 1974, 1975, 1976, 1977, and 1978.

How you propose doing the things that are required for exactly the same amount of money each year, and the expense that you have reprogramed in each of those years, if you kept any records, we would like to know, and if you do not have any records, we want your best educated guesses.

In particular, we want the numbers of personnel.

Mr. Milias. Yes, sir.

[See p. 307 for insert with this information.]

Mr. Forsythe. If the gentleman will yield.

I think so far as enforcement is concerned, the information should show the total level of enforcement personnel and whether it has expanded, or been reduced as a result of level budgeting.

Mr. Leggett. Now, we have increased the overall level of enforcement, because I know we have had some augmentations on that, the press has been very much concerned about this, and so has the committee, so it is possible that enforcement personnel have been paid for through other specific funds which we have been able to use for omnibus purposes, including this Act.

Mr. Milias. Our enforcement effort has remained relatively stable in recent years.

Mr. Trible. I have no further questions.

Thank you, Mr. Chairman.

Mr. Leggett. Counsel, Mr. Mannina?

Mr. Mannina. Thank you, Mr. Chairman.

Mr. Milias, could you tell us what the Service requested for sections 114 and 110?

Mr. Milias. The Service requested a 30 percent increase in funding for sections 110(c) and 114(b).

Mr. Mannina. And the figures in H.R. 4740 represent a 30-percent increase over your present expenditures, do they not?

Mr. Milias. Yes, sir.

Mr. Mannina. Thank you.

In responding to the chairman's request, could you also indicate how you would use that additional 30 percent?

Mr. Milias. Yes, of course.

[See insert on p. 307 for information.]

Mr. MANNINA. Thank you.

Can you also provide a projection of 5-year expenditures for each fiscal year?

Mr. MILIAS. Yes.

Mr. MANNINA. For each section.

Mr. MILIAS. Yes.

[See insert on p. 307 for information.]

Mr. MANNINA. Thank you.

Does the Fish and Wildlife Service have any enforcement contracts with States under the Marine Mammal Protection Act?

Mr. MILIAS. No.

Mr. MANNINA. With respect to the return of management to Alaska, if you act affirmatively on the remaining species, do you anticipate any grants to the State of Alaska pursuant to section 109?

Mr. MILIAS. We have no present plans or money to do so.

Mr. MANNINA. Is that also the case with walrus?

Mr. MILIAS. Yes.

Mr. MANNINA. Thank you.

Thank you, Mr. Chairman.

Mr. LEGGETT. Mr. Thornton, any questions?

Mr. THORNTON. No questions.

Mr. LEGGETT. All right.

I think we have exhausted this subject.

Now, in your zero based papers that you are going to present to the committee, you will also present to us a copy of the justification that you presented to OMB, your internal working paper?

Mr. MILIAS. Yes, sir.

Mr. LEGGETT. OK.

I guess that is all for now. Thank you very much.

Now, we have Mr. John Twiss of the Marine Mammal Commission, accompanied by Dr. Hofman and Mr. Eisenbud.

Mr. Twiss, very nice to have you back before the committee, and your associates.

STATEMENT OF JOHN R. TWISS, JR., EXECUTIVE DIRECTOR, MARINE MAMMAL COMMISSION, ACCOMPANIED BY DR. ROBERT J. HOFMAN, SCIENTIFIC PROGRAM DIRECTOR AND ROBERT EISENBUD, GENERAL COUNSEL

Mr. TWISS. Thank you, Mr. Chairman.

Mr. LEGGETT. It might be best if you proceeded to present your statement.

[The statement follows:]

STATEMENT OF JOHN R. TWISS, JR. EXECUTIVE DIRECTOR, MARINE MAMMAL COMMISSION

Good afternoon, Mr. Chairman and members of the Committee. My name is John Twiss; I am Executive Director of the Marine Mammal Commission. Accompanying me are Robert Eisenbud, General Counsel, and Robert Hofman, Scientific Program Director. Dr. Douglas G. Chapman, Chairman of the Commission, has asked that I apologize for his not being here. Because of a commitment of some months standing, he must be on the west coast today.

BACKGROUND

In fulfilling its responsibilities, under the Marine Mammal Protection Act, the Commission has:

Participated in hearings, on specific issues and oversight, before this Committee;

Participated in administrative hearings on regulations, requests for waivers of the moratorium, and requests for return of management;

Made formal recommendations to the Congress and to Federal agencies on more than 105 matters, other than permit applications, related to marine mammal protection, conservation, and management;

Recommended actions to the Secretaries of Commerce and the Interior on 228 permit applications to take marine mammals for purposes of scientific research or public display;

Contributed to the development of the U.S. position in international negotiations affecting marine mammals;

Made recommendations to the Congress concerning ratification of agreements on polar bears, Antarctic seals, and North Pacific fur seals;

Recommended to the Departments of Commerce, the Interior, and Agriculture, standards for the holding of marine mammals;

Undertaken studies of marine and coastal areas in which marine mammals may require special protection;

Made recommendations on research, the negotiation of international agreements, and other matters in efforts to resolve the tuna-porpoise problem;

Caused the undertaking of, participated in and partially supported a major research cruise devoted to examining behavioral as well as other approaches to solving the tuna-porpoise problem;

Conducted and/or supported workshops on tuna-porpoise behavior; population assessment; the status of certain stocks; sea otter research; marine mammal marking and data storage, the effect of the Nantucket oil spill on marine mammals; and porpoise breeding in captivity;

Reviewed and commented on marine mammal research activities of other Federal agencies;

Recommended changes in the Endangered Species List including recommending designation of the Hawaiian monk seal as endangered and parts of its habitat as critical;

Carefully evaluated activities undertaken by Federal agencies to enforce the Marine Mammal Protection Act and made recommendations based on that review;

Carefully reviewed the permit system and recommended approaches to improving its efficiency;

Analyzed and recommended changes in management plans affecting marine mammals in national parks;

Made recommendations on proposed outer continental shelf leasing and drilling actions;

Reviewed and commented on the California Coastal Plan for coastal zone management; and

Contributed papers and expertise to domestic and international scientific consultations on marine mammals.

THE OBJECTIVES FOR FISCAL YEAR 1978

Certain of our objectives for fiscal year 1978 reflect continuing responsibilities. These are:

To continue to manage and make known the results of the program of research and studies in which specific problem areas relevant to the conservation and protection of marine mammals are addressed;

To exercise a catalytic and coordinating influence upon the overall national marine mammal research and study efforts to ensure a greater yield and prevent wasteful, duplicative research;

To make recommendations to the Secretaries of Commerce and the Interior regarding the issuance of permits for the taking of marine mammals;

To make recommendations to the Secretaries of Commerce and the Interior regarding waivers of the moratorium, the resumption of state management, and other matters; and

To continue to participate in and make recommendations on the role of the United States in international negotiations affecting the welfare of marine mammals.

In fiscal year 1978, the Commission will place continued emphasis on contributing to the negotiation of an agreement governing the conservation of living marine resources in the Southern Ocean—the area surrounding Antarctica. This ocean will probably be subject to severe over-exploitation if prompt and effective measures for conservation are not taken. The Commission considers conservation and protection of the living resources of the Southern Ocean to be of utmost importance.

By late 1977, the Commission expects management of marine mammal populations will have returned to the State of Alaska. In hopes of constructively contributing to sound State management practices, the Commission and its Committee of Scientific Advisors will become more intensively involved in a review, both biological and sociological, of activities related to marine mammal management in the State.

Intensive analyses of collected data on populations and subpopulations will be continued in an effort to further refine the wildlife management principles embodied in the Act.

The tuna-porpoise problem will continue to place the greatest single demand on Commission resources in fiscal year 1978. Although the situation is not entirely clear now, the tuna industry has stated that it would make a fishing vessel available for research purposes for a year. In addition to providing a chief scientist for the research effort, the Commission will also support discrete research projects on the problem. We expect to devote roughly a third of the Commission's research budget to this—probably the most pressing national issue affecting marine mammals.

The strength of the Commission has come, in no small measure, from its Committee of Scientific Advisors on Marine Mammals. The Committee will continue to play a critical role in the planning and implementation of special studies for the Commission. Consistent with past practice, new subcommittees will be formed to deal with important issues as they arise. In fiscal year 1978, there will be special emphasis placed on the tuna-porpoise problem, the relationships that exist between certain marine mammals and fisheries, the review of agency research activities, the development of new research plans, the review and analysis of state management practices, and the continued provision of scientific bases for international negotiations.

Last but not least, the Commission has successfully held a number of workshops. The one with which all of you are most familiar is the one which formed the basis for the tuna-porpoise research cruise last year. We intend to increase our workshop approach to issues in fiscal year 1978. For example, we shall hold workshops on issues related to problems in Alaska, to the sea otter problem in California, and to marine mammal fishery interactions.

No attempt will be made to support all appropriate marine mammal research with Commission funds. Instead, the Commission will continue to emphasize its coordinating and catalytic role by fostering the development of needed national and international marine mammal research programs. Consistent with its intention to transfer research responsibilities for $100,000 worth of research to the Department of Commerce and of the Interior in fiscal year 1978, the Commission will continue to emphasize further assumption of certain of its research responsibilities by the line agencies in fiscal year 1979.

REQUESTED LANGUAGE CHANGE

The Commission requests that you consider striking the second sentence of Section 207. This sentence mandates that two-thirds of the Commission's budget be devoted to research and study activities. The deletion of language provides for more flexible allocation of sums appropriated than is currently the case. Such flexibility will be necessary in order for the Commission to operate at the requested level of $900,000.

CONCLUSION

The Commission has been instrumental in: developing marine mammal management policies; developing biologically and legally constructive approaches to requests for waivers of the moratorium; carefully directing support of research to further conserve marine mammals; developing a body of information on which to base international negotiations related to marine mammal conservation; carefully and objectively exercising its overview responsibilities; guiding agencies in responsibly addressing critical issues: insuring that agencies effectively enforce the provisions of the Act; and responsibly providing the overview analysis of activities being conducted pursuant to the Act. The record, developed through Commission recommendations, consultation with agencies, and participation in hearings, shows that the Commission has been essential in improving implementation of the Act, and that continued efforts by the Commission are essential. As marine mammal issues become more complex and the pressures upon marine mammal populations become more intense, the value of the Marine Mammal Commission will increase proportionately.

The funds herein requested will be adequate for the Commission to efficiently and effectively fulfill its obligations under the Marine Mammal Protection Act of 1972.

Mr. Leggett. Is it correct that you want to delete the language calling for a one-third/two-thirds administration/research split in your authoriaztion?

Mr. Twiss. It is, Mr. Chairman, and I can explain in detail why I feel it necessary.

Mr. Leggett. All right.

Why was the language originally put in there?

Mr. Twiss. It was put in to keep the Marine Mammal Commission from becoming an overstaffed bureaucratic burden upon everyone.

Mr. Leggett. You certainly have not done that.

Mr. Twiss. Well, before the Commission got under way, concern was expressed that we might. There was also concern that adequate sums might not be devoted to research the studies.

We have assidiously devoted two-thirds of our budget every year to research problems. The problem for this coming year is, at the requested level of $900,000, our operating expenses are going to be about $446,000.

Although $82,000 is directly chargeable to the research and studies programs, the balance remaining exceeds the allowable one-third by about $64,000.

Mr. Leggett. If we gave you the $2 million, then you would not need that section repealed, would you?

Mr. Twiss. If we were actually appropriated $2 million, we would not. However, at an appropriation of anything less than about $1,050,000, it would be necessary.

Mr. Leggett. The last sentence of your statement, I think, is the one we want to get to.

You are asking to transfer $100,000 of your budget over to Commerce. Why do you do that?

Mr. Twiss. It is the administration's view that the Marine Mammal Commission can effectively fulfill its responsibilities while decreasing its expenditures on research problems by $100,000 in fiscal year 1978.

Mr. Leggett. Do you think that Commerce can do the research better than you can?

Mr. Forsythe. Would the chairman yield?

Mr. Leggett. Yes—let him answer that question first.

Mr. Twiss. No. But with our careful guidance and counsel, I believe that they could probably do reasonably well.

Mr. LEGGETT. Go ahead and help him.

Mr. FORSYTHE. Is this not the fund that goes into the pool that provides the tuna research program that Commerce has been operating?

Mr. TWISS. Yes.

Mr. LEGGETT. Is this $100,000 tuna research money?

Mr. TWISS. Not necessarily. The $100,000 is part of the Commission's general research and studies moneys. In fiscal year 1976, about $200,000 of this was spent on tuna-porpoise activities.

Mr. LEGGETT. More precisely, how much money did you put in the pool for the tuna research?

Mr. TWISS. Slightly more than $196,000.

Mr. FORSYTHE. The thing that I was trying to get to is that without your really putting some money in, so far as this tuna research program is going, the likelihood of getting it really underway was far less. In fact, the Commission served as a catalyst in this whole function. It has really helped us to get some substantial research in gear and so forth underway.

Mr. TWISS. That is a very accurate statement. The behavioral research can be directly traced to the Commission. Neither the industry nor any other agency merits, in any way, credit for initiating the cruise.

Mr. LEGGETT. But does this $100,000 that is being transferred here have anything to do with that?

Mr. TWISS. Not precisely, no.

Mr. LEGGETT. Did we transfer $100,000 last year?

Mr. TWISS. No, we did not.

Mr. LEGGETT. The question is now, why are you transferring $100,000 to the Department of Commerce?

Mr. MANNINA. Mr. Chairman?

Mr. LEGGETT. Mr. Mannina.

Mr. MANNINA. John, what did you request of OMB for fiscal 1978?

Mr. TWISS. $1 million.

Mr. MANNINA. And you were appropriated what in fiscal 1977?

Mr. TWISS. $1 million.

Mr. MANNINA. And what did OMB give you for 1978?

Mr. TWISS. $900,000.

Mr. MANNINA. And the statement you are presenting today is that OMB justification for the reduction from $1 million to $900,000. Is that accurate?

Mr. TWISS. It is the administration's statement, as cleared by OMB, on our budget.

Mr. MANNINA. Thank you.

Mr. LEGGETT. Do I understand that we have $2 million in our bill for this function?

Mr. MANNINA. Yes.

Mr. LEGGETT. Where did we get that number?

Mr. MANNINA. We worked with individuals of the Commission to develop an optimal budget. The Commission was requested to provide the committee with how that $2 million would be utilized.

Mr. LEGGETT. Did any of the gentlemen testifying participate in arriving at this number?

Mr. Twiss. Yes. I did.

Mr. Leggett. How did we come to this last statement that states that "The funds herein requested will be adequate for the Commission to efficiently and efficiently fulfill its obligations under the Marine Mammal Protection Act of 1972"?

Is there anybody at the table who believes that?

Let the record show you are silent.

Now, the next question is can you present to the committee, the same kind of analysis that we asked from the previous witnesses?

Assuming we asked a zero base, what you have done for the past 3 or 4 years while you have gone from $412,000 to $750 to $900,000 to $1 million. Now, you are going back to $900,000. What we would like you to do is to tell us for each of those years what you did and what you could now do for $2 million, which you could presume to be the committee's recommendation if that makes you more comfortable. Tell us what you could do for $900,000. The difference, I presume, would be something other than efficiently and effectively fulfilling your responsibilities under the act.

Mr. Twiss. I shall, Mr. Chairman.

Mr. Leggett. OK.

That will be helpful to us.

Mr. Twiss. Very glad to.

[The following was received for the record:]

Marine Mammal Commission,
Washington, D.C., April 15, 1977.

Hon. Robert L. Leggett,
Chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment, House of Representatives, Washington, D.C.

Dear Mr. Chairman: During the course of the authorization hearings held on March 15th, you asked that I provide information on: Commission accomplishments during the last three years; the way in which we would expend either $2,000,000, $1,000,000, or $900,000 in fiscal year 1978, depending upon the amount appropriated; and a five-year projected budget.

ACCOMPLISHMENTS SINCE FEBRUARY 1974

The Marine Mammal Commission came into full operation in mid-February 1974 with the selection of its first staff members and the opening of its offices. The activities of the Commission since that time are discussed in its annual reports which have been published in January of 1975, 1976, and 1977. For purposes of this record, I shall briefly summarize the accomplishments which are fully treated in the Reports. In three years the Commission has:

"Devoted at least two-thirds of its budget to research and study activities to further the protection and conservation of marine mammals;

"Participated in hearings, on specific issue and oversight, before this committee and others;

"Participated in administrative hearings on regulations, requests for waivers of the moratorium, and requests for return of management;

"Made formal recommendations to the Congress and to Federal agencies on more than 110 matters, other than permit applications, related to marine mammal protection, conservation, and management;

"Recommended actions to the Secretaries of Commerce and the Interior on more than 230 permit applications to take marine mammals for purposes of scientific research or public display;

"Contributed to the development of the U.S. positions for and participated in international negotiations affecting marine mammals;

"Made recommendations to the Congress concerning ratification of agreements on polar bears, Antarctic seals, the North Pacific fur seals;

"Recommended to the Departments of Commerce, the Interior, and Agriculture standards for the holding of marine mammals;

"Undertaken studies of marine and coastal areas in which marine mammals may require special protection;

"Made recommendations on research, the negotiation of international agreements, and other matters in efforts to resolve the tuna-porpoise problem;

"Caused the undertaking of, participated in, and partially supported a major research cruise devoted to examining behavioral as well as other approaches to solving the tuna-porpoise problem;

"Conducted and/or supported workshops on tuna-porpoise behavior; population assessment; the status of certain stocks; sea otter research; marine mammal marking and data storage; the effect of the Nantucket oil spill on marine mammals; and porpoise breeding in captivity;

"Reviewed and commented on marine mammal research activities of other Federal agencies;

"Recommended changes in the Endangered Species List including recommending designation of the Hawaiian monk seal as endangered and parts of its habitat as critical;

"Evaluated activities undertaken by Federal agencies to enforce the Marine Mammal Protection Act and made recommendations based on that review;

"Reviewed the permit system and recommended approaches to improving its efficiency;

"Analyzed and recommended changes in management plans affecting marine mammals in certain national parks;

"Made recommendations on proposed outer continental shelf leasing and drilling actions;

"Reviewed and commented on the California Coastal Plan for coastal zone management; and

"Contributed papers and expertise to domestic and international scientific consultations, such as the FAO meeting in Bergen, on marine mammals."

FISCAL YEAR 1978 ACTIVITIES AT $2,000,000, $1,000,000, AND $900,000

In answering this question, I would like to address initially three points: the five-year budget projections for the Commission; Commission staffing; and implementation of Section 110(a) of the Marine Mammal Protection Act of 1972.

Budget Projections

As stated in our testimony, the Administration's current policy is that operational research activities of the Commission should be diminished in accordance with the line agencies' abilities to assume these responsibilities. The Commission is to continue to support research activities essential to the fulfillment of its statutory research responsibilities and to its policy determinations. Consistent with this view, the Administration has provided the following long-range budget projections: fiscal year 1978, $900,000; fiscal year 1979, $760,000; fiscal year 1980, $712,000; fiscal year 1981, $665,000; fiscal year 1982, $617,000. The fiscal year 1979 through 1982 figures do not include provisions for inflationary increases at this time.

Commission Staffing

At present, the total Commission staff, including secretarial help, numbers ten. The Scientific Program Director is actively managing about 70 research and study contracts. Were the Commission to be provided $2,000,000 in fiscal year 1978, the additional $1,000,000 would be used for research and studies. Without additional high-level scientific talent, the Commission cannot properly oversee the additional research activities. Therefore, we believe that the additional $1,000,000 should not be sought by the Commission unless provision is made for additional staff.

Section 110(a)

Section 110(a) of the Marine Mammal Protection Act provides the line agencies with authority to make grants or otherwise provide financial assistance to "any Federal or State agency, public or private institution, or other person for the purpose of assisting such agency, institution, or person to undertake research in subjects which are relevant to the protection and conservation of marine mammals." The Commission is deeply concerned that the use of the authorities provided in Section 110(a) has been totally inadequate. Were sums appropriated to Commerce and Interior for use under Section 110(a), the Commission believes that some research which it would contemplate supporting in fiscal year 1978 could be supported by the agencies in consultation with the Commission, as provided for in Section 110(c). The Commission respectfully recommends, therefore, that your Committee consider the benefits to be realized in forcing line agencies to activly support research programs as envisioned in Section 110(a) of the Marine Mammal Protection Act. Furthermore, the Commission believes that it would be appropriate to specify that a portion of each Department's appropriation for fiscal year 1978 be used to start formal granting programs under Section 110(a).

Activities

The following are the projections for fiscal year 1978 at $900,000, $1,000,000, and $2,000,000. Section I lists the research activities that would be carried out were funding provided at the $900,000 level; Section II includes additional research possible at the $1,000,000 level; and Section III outlines further research that could be done were the Commission appropriate $2,000,000.

I. $900,000 ($450,000 Research)—

(a) Tuna-Porpoise Research (Chief Scientist, for cruise, Behavioral work, Population work, etc.), $150,000.

(b) Application of the Concept of Optimum Sustainable Populations: (1) Workshops ($25,000), (2) Follow-up (Case studies, $50,000), $75,000.

(c) Marine Mammal Fisheries Interactions (Assessment of Alaskan and other regional problems), $50,000.

(d) Conservation of Southern Ocean Resources (Studies to further support MMC policy guidance), $25,000.

(e) Outer Continental Shelf & Coastal Zone Research (Studies necessary for development & support of MMC recommendations), $25,000.

(f) Global Analysis of Recent Marine Mammal Takings (First annual update and data computerization), $10,000.

(g) Workshops to Evaluate Regional Problems including Critical Habitats (Habitat, stranding, enforcement, public education, etc.), $30,000.

(h) California Sea Otter Research (Ecosystem studies), $30,000.

(i) Protection of Hawaiian Monk Seal Habitat, $10,000.

(j) Alaskan Population Data (Evaluation of unanalyzed data), $30,000.

Total, $450,000.

II. $1,000,000 ($550,000 Research)—

(a) Radio Telemetry Workshop (Increased utilization of existing techniques). $10,000.

(b) Sea Otter Salvage & Necropsy Program, California (Assistance to State to develop coordinated program for data collection and utilization), $25,000.

(c) Florida Tursiops Data Analysis and Tagging Initiation (Resolve uncertainties about local populations under pressure), $25,000.

(d) Tagging & Marking Methodology (Technique refinement & standardization), $25,000.

(e) Analysis of Harp Seal Data, $15,000.

Total, $100,000.

III. $2,000,000 ($1,550,000 Research)—

(a) California Sea Otters (Baseline, Salvage, Necropsy, and Tagging Research) (FWS), $125,000.

(b) Marine Mammal Fisheries Interactions California, Alaska, Florida, Oregon, Washington (Case studies) (NMFS & FWS), $100,000.

(c) Critical Habitat (Site Identification, Research, & Follow-up Research) (NMFS), $50,000.

(d) Arctic Marine Mammal Census Studies (e.g. walrus, ice seals, & selected cetaceans) (NMFS + FWS), $150,000.

(e) Ecosystem modeling (NMFS + FWS), $100,000.

(f) Support of State & Regional Management Planning & Research (NMFS + FWS), $175,000.

(g) Biochemical Methods of Stock Identity (Large cetaceans) (NMFS), $50,000.

(h) Migration and Biological Parameters of Killer Whiles (NMFS), $25,000.

(i) Captive Animal Husbandry and Development of Biochemical Baselines (NMFS + FWS), $75,000.

(j) Intensive Analysis of International Whaling Commission Data (NMFS), $50,000.

(k) Bowhead Whale Population Studies (NMFS), $50,000.

(l) Studies on Hawaiian Monk Seals (NMFS), $25,000.

(m) Evaluation of subsistence taking in Alaska (NMFS + FWS), $25,000.

Total, $1,000,000.

In Section III, setting forth research at the $2,000,000 level, you will note that we have parenthetically cited the agency or agencies which we feel could appropriately carry out the research should they sek and be appropriated funds under Section 110(a).

Requested Change in Language

We respectfully request that your consider striking the second sentence of Section 207. This sentence reads: "Not less than two-thirds of the total amount of the sums appropriated pursuant to this section for any such year shall be expended on research and studies conducted under the authority of Section 202(a)(2) and (3) of this title." For reasons set forth in our testimony, the Commission will not be able to live within the limits imposed by this provision if it is appropriated money at the $1 million level or less without severely diminishing the activities and effectiveness of the Commission, its Staff, and its Committee of Scientific Advisors on Marine Mammals.

Sincerely,

JOHN R. TWISS, Jr.
Executive Director.

MARINE MAMMAL COMMISSION,
Washington, D.C., May 6, 1977.

Hon. ROBERT L. LEGGETT,
Chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Members of your staff recently asked for information to supplement that in my letter of 15 April 1977. Since this information is supplemental, I shall not repeat, in detail, information contained in that letter.

Accomplishments Since February 1974: The first three pages of the 15 April letter outline Commission accomplishments in brief. Our Annual Reports for Calendar Years 1974, 1975, and 1976 fully substantiate and document these and a number of other accomplishments.

Fixed Operating Costs: Commission operating costs not associated with the funding of research and study contracts will be approximately $450,000 in fiscal year 1978. Slightly more than $80,000 of this money is, however, directly chargeable to research and studies in that it constitutes partial support of Commission, staff, and Committee time devoted exclusively to those activities. Without severely impairing the Commission's ability to operate, these fixed operating costs cannot be reduced. At any level below $450,000, it would be necessary to severely curtail activities of either the Commission, the staff, and/or the Committee of Scientific Advisors on Marine Mammals.

$1.000.000, and $2,000,000 levels are $450,000, $550,000, and $1,550,000 respec-

Therefore, monies available for research and study contracts at the $900,000, tively. As will be noted in the succeeding paragraph, we do not believe that current staffing levels would be adequate to manage research and studies activities at a $2,000,000 appropriation level with the same degree of care and consequent beneficial results as is possible at the $1,000,000 level.

Commission Staffing: At present, the total Commission staff, including secretarial help, numbers ten. The Scientific Program Director is actively managing about 70 research and study contracts. Were the Commission to be provided $2,000,000 in fiscal year 1978, the additional $1,000,000 would be used for research and studies. Without additional high-level scientific talent, the Commission cannot properly oversee the additional research activities. Therefore, we believe that the additional $1,000,000 should not be sought by the Commission unless provision is made for additional staff.

Section 110(a): The Commission does not believe that the line agencies have used the provisions of Section 110(a) of the Act as hoped for by the Congress. Development of a strong national marine mammal research program depends upon line agencies developing effective granting and/or contracting programs under this Section. Such programs under Section 110(a) would be subject to careful scrutiny and review by the Commission as provided for in Section 110(b). The Commission respectfully recommends, therefore, that your Committee consider the benefits to be realized in forcing the line agencies to establish, in fiscal year 1978, research programs as provided for in Section 110(a).

Section 207: The Commission also requests that you consider striking the second sentence of Section 207 which reads: "Not less than two-thirds of the total amount of the sums appropriated pursuant to this section for any such year shall be expended on research and studies conducted under the authority of Section 202(a)(2) and (3) of this title." As set forth in our earlier testimony and the section of this letter devoted to administrative costs, the Commission cannot operate within the limits of this provision if appropriated $1,000,000 or less without severely diminishing the effectiveness of the Commission, the staff, and the Committee of Scientific Advisors on Marine Mammals.

Research Activities: Your staff has requested further elaboration on the research activities described on pages 5 and 6 of our 15 April 1977 letter. Section I lists appropriate research activities if an appropriation were made at the $900,000 level; Section II includes additional research which would be possible at the $1,000,000 level; and Section III outlines further research that plans to support work in behavior and population dynamics. ($150,000)

Section I: $900,000 Appropriation; $450,000 for Research and Studies.

a. Tuna-porpoise research. The tuna-porpoise problem continues to be the most pressing domestic issue. In 1978, the Commission intends to provide support for a chief scientist to supervise the planning of research activities for the dedicated vessel, conduct of research aboard the vessel, and the writing up and interpretation of results following the cruise. The Commission also plans to support work in behavior and population dynamics. ($150.000)

b. Application of the concept of optimum sustainable populations. The Commission is progressing towards a definition of optimum sustainable populations within the carrying capacity of the habitat, taking into account ecosystem considerations, that will be broadly applicable in terms of general wildlife management. This critical philosophical concept underlying the entire Act is appropriately viewed as a more sophisticated and rational mechanism for wildlife management than the concept of maximum sustainable yield as developed in the early 50's, and provides a more sound rationale for management policies and practices designed to protect and conserve marine mammals. The Commission will hold at least one workshop on the concept, and will support case studies designed to apply the theory to actual marine mammal populations. ($75,000)

c. Marine mammal/fisheries interactions. In a number of states, notably California, Alaska, Florida, Hawaii, Washington, and Oregon, the interactions of marine mammals with other forms of marine life are of concern to conservationists, commercial fishermen, and/or sport fishermen. Present understanding of these relationships is inadequate to allow a reasonable determination of the extent of the real problems. The Commission will assess the problems through workshops and special studies to subsequently provide guidance and direction to the line agencies on needed research activities to cope with the problems. ($50,000)

d. Conservation of Southern Ocean resources. Starting in late 1975, the Marine Mammal Commission began making formal recommendations concerning the development of an adequate research program to assess living resources of the Southern Ocean for purposes of developing a rational scheme for their protection and conservation. The Commission has also sought to encourage the conclusion of a convention on the conservation of these resources with other Antarctic treaty nations. We continue to consider this to be one of the most critical conservation issues affecting not only marine mammals, but a host of other species, and intend to make every effort to see that a meaningful convention is concluded as quickly as is possible. To this end, the Commission will support certain discrete studies to support the policy recommendations which the Commission will make. ($30,000)

e. Outer Continental Shelf and Coastal Zone research. The Commission has made a number of recommendations to the Bureau of Land Management concerning Outer Continental Shelf leasing activities. We shall continue to do so in fiscal year 1978, and to make such short-term studies as are needed to gather information in order to comment on proposed activities. Only in this way, can adequate guidance be given.

As for Coastal Zone activities, the Commission carefully reviewed the California Coastal Plan and offered to make funds available to the State for an in-state group of marine mammalogists to refine the coastal plan as it relates to the needs of and impacts upon various marine mammal populations. In fiscal year 1978, we shall intensify our efforts, in this and other ways, to assist States in their efforts to accommodate marine mammals in management plans. To do this, convening small working groups of scientists intimately involved in regional issues is necessary. ($25,000)

f. Global Analysis of Recent Marine Mammal Taking. In FY '77, the Commission will publish its analysis of global marine mammal takings—a review for all species of levels of take over the last ten years, current status of populations and subpopulations, research underway, and other critical information needed for management to conserve and protect marine mammals. In fiscal year 1978, the Commission will update and computerize its report to include information gathered through 1977. This should be available in the early fall of 1978. The information contained therein, unavailable anywhere else in the world, is essential for developing rational approaches to international marine mammal conservation efforts. After assuring itself that the computerization process and quality control of information are entirely satisfactory, the Commission expects the line agencies to assume full responsibility for annually updating this material. ($10,000)

g. Workshops to evaluate regional problems. The Commission will support workshops to evaluate specific regional problems. Based on these evaluations, the Commission will make recommendations to Federal and State agencies on approaches designed to insure the proper conservation and protection of marine mammals. Typical subjects for workshop discussions will be critical habitats, strandings, enforcement activities, and public education. ($30,000)

h. California Sea Otter research. It is necessary to continue to develop, as rapidly as possible, a better understanding of the sea otters' role in the ecosystem. The Commission has supported work in this area, and is committed to the proposition that additional research, by the Commission, the Fish and Wildlife Service, and the State of California, will be necessary to develop a reasonable understanding of the present situation and a strategy for resolving the problem. ($30,000)

i. Protection of Hawaiian Monk Seal habitat. The Commission recommended designation of the Hawaiian monk seal as "endangered" and "depleted" and further recommended that areas of the Hawaiian archipelago be designated critical habitats in order to provide protection beyond that afforded by the Marine Mammal Protection Act. Further studies are needed to monitor the results of absolute protection and to suggest ways in which the recovery of this species may be encouraged. ($20,000)

j. Alaskan population data. After working intensively on population data for marine mammals in Alaska, the Commission is convinced that there exists a wealth of unanalyzed data which could contribute to a far better understanding of the status of various species and stocks. The Commission, therefore, intends to support work which will provide the State of Alaska, the Federal Government, and others with additional essential information on which to base rational management decisions. The Commission has offered to convene a workshop, at Commission expense, as the first step in undertaking these analyses. ($30,000)

Section II: $1,000,000 Appropriation; $550,000 for Research and Studies.

In addition to previously described activities, the following activities are considered appropriate for support at the $1,000,000 level.

a. Radio Telemetry Workshop. Insubstantial use is being made of existing technology to monitor the numbers, movements, and activities of marine mammals. The Commission intends to bring together a number of scientists and engineers involved in radio telemetric work to insure that, through an adequate and extensive exchange of information, full advantage can be taken of existing technology in present and proposed research and censusing efforts. ($10.000)

b. Sea Otter Salvage and Necropsy Program, California. We have already referred to the critical need for additional information on California sea otters. As a part of this effort, the Commission hopes to assist the State to develop a coordinated program for data collection and utilization. Data thus collected are needed to monitor the status of the population and to contribute to determining rational management strategies that will insure he protection and conservation of the California sea otter population. ($25,000)

c. Florida Bottlenose Dolphin, *Tursiops truncatus*, Data Analysis and Tagging Initiation. Uncertainties associated with *Tursiops* population levels surrounding Florida and in the Gulf of Mexico can be resolved through a carefully described program designed to provide the necessary information for intelligent management. These funds would be used to catalytically force appropriate population and behavioral research and to analyze past capture records. ($25,000)

d. Tagging and Marking Methodology. There are a number of marine mammal tagging and marking techniques in use. Several, with further refinement, can be of substantially greater use and value. Furthermore, the lack of standardization in tagging and marking methodology has contributed, and will continue to contribute unless changed, to lesser data utilization than might otherwise be possible. The Commission will continue to support studies to develop and standardize tagging and marking techniques based on past research and key efforts defined in workshops presently underway and planned. ($25,000)

e. Analysis of Harp Seal Data. The Commission believes that the United States, not having exercised its options under the International Convention for North Atlantic Fisheries, may still influence the harp seal fishery by carefully analyzing collected data on this species. The results of that study may conclusively demonstrate the existence of compelling biological reasons for diminishing the take. ($15,000)

Section III: $2,000,000 Appropriation,, $1,550,000 for Research and Studies.

a. California Sea Otters. In addition to work already described, needs to gather additional information on the California sea otter must be met. For example, manipulative and descriptive studies to determine precisely how sea otters influence nearshore community compositions are needed. Some management decisions will have to be made before all of the necessary information is gathered since the process will take a number of years. In the interim, every effort must be made to gather, according to a rational plan, as much information as possible to provide continuing guidance for the development of management policies. ($125,000)

b. Marine Mammal Fisheries Interactions in California, Alaska, Florida, Oregon, and Washington. In addition to the Commission's workshop and study approach to this issue discussed earlier, specific case studies must be done. These would include analyses of the relationships between various species of marine mammals and commercial and sports fisheries with which they interact. The Commission would expect to support this work on a cooperative basis with concerned Federal and State agencies. ($100,000)

c. Critical Habitat. Precise site identification, with attendant research activities and follow-up research, must be done to define and support the designation of certain areas as critical marine mammal habitats and to refine governing habitat designation and management. ($50,000)

d. Arctic Marine Mammal Census Studies. As has been noted earlier, a wealth of unanalyzed information exists about marine mammals in the Arctic. In conjunction with analyses of previously collected data, more sophisticated and comprehensive censuses of certain species should be done. A critical review of collected data and intensive censusing of present populations will provide an understanding, presently lacking, of existing population parameters essential to refining management strategies to protect and conserve the animals. ($150,000)

e. Eurosystem Modeling. Attempts have been made to model various ecosystems, including National Marine Fisheries Service efforts in the Bering Sea. For a number of reasons, not the least of which is its basic belief that populations must be viewed within the ecosystem context, the Commission intends to support additional research on ecosystem analyses. Included would be examinations of discrete coastal ecosystems of the United States and an intensified Southern Ocean effort. ($100,000)

f. Support of State and Regional Management Planning and Research. Additional support, as would be appropriate under Sections 109 and 110(a), would be provided several State agencies involved in developing management strategies to assure the conservation of marine mammal populations. This is particularly true for California and Alaska. ($175,000)

g. Biochemical Methods of Stock Identity. Sound management practices require management by populations rather than species. In determining the actual status of given marine mammal populations such as various species of large cetaceans, one must understand whether animals constitute a discrete population or a viable part of the total population. Knowledge derived from biochemical identification of populations can therefore contribute substantially to decisions on critical habitat designation and other provisions for special protection as appropriate. ($50,000)

h. Migration and Biological Parameters of Killer Whales. The Commission has supported studies of killer whales in Puget Sound. Further understanding of the biology and migration habits of these animals is possible, necessary, and worthy of support. Information gathered as a result of cooperative Marine Mammal Commission/National Marine Fisheries Service efforts will be used to refine policies for their proper long-term management and conservation. ($25,000)

i. Captive Animal Husbandry and Development of Biochemical Baselines. An investment in husbandry techniques and the development of biochemical baselines is important to insure successful propagation and healthy maintenance of captive marine mammals. Although some work has been done in this area, there is a need for a substantially increased effort in propagation and biochemical baseline determinations to reduce the levels of take from the wild. ($75,000)

j. Intensive Analysis of International Whaling Commission Data. Thanks to earlier Commission work, all data collected by the International Whaling Commission is being computerized in a single system. An intensive analysis of this data should be undertaken to provide information on population trends and suggest appropriate management strategies to better protect and conserve whales. ($50,000)

k. Bowhead Whale Population Studies. The Commission has recently completed a review of bowhead whale data and recommended that the bowhead be declared "depleted." Every effort must be made to assist in this species' recovery. Additional information on population size, recruitment rates, and distribution should be developed, and a substantial additional investment from the Commission to supplement the National Marine Fisheries Service program would be appropriate. ($50,000)

l. Studies on Hawaiian Monk Seals. The recovery of the Hawaiian monk seal, if it can be accomplished, will depend upon the cooperative efforts of the National Marine Fisheries Service, the Fish and Wildlife Service, and the State of Hawaii to develop those strategies most likely to lead to recovery. The Commission would contribute, both through the support of discrete studies and possibly the convening of a task-oriented workshop, to insure that all reasonable avenues are explored to attain this goal. ($25,000)

m. Evaluation of Subsistence Taking in Alaska. A problem of considerable concern to Eskimos, Aleuts, Indians, the Government of the State of Alaska, and the Federal Government, is subsistence taking. "Subsistence" is, in general, poorly defined. The Commission would exert a catalytic influence on the development of rational policies governing subsistence taking while insuring that needs for the protection and conservation of marine mammal populations are met. The Commission would cooperate with the State of Alaska, the National Marine Fisheries Service, the Fish and Wildlife Service, and the Federal/State Alaska Land Use Planning Commission in these efforts. ($25,000)

I hope that the foregoing discussion is an adequate elaboration on our letter of 15 April 1977.

Sincerely,

JOHN R. TWISS, JR.,
Executive Director.

Mr. LEGGETT. Mr. Forsythe.

Mr. FORSYTHE. Thank you, Mr. Chairman.

I understand there was testimony on the Senate side on the tuna-porpoise issue, which I realize is not the main thrust of this meeting but which we should perhaps try and clear up, that under the IWC regulations, no eastern spinner can be taken. Am I correct in saying that if we were managing eastern spinners, under the IWC, so far as the Marine Mammal Commission is concerned, then that would be the case?

Mr. Twiss. There was testimony to that effect, Mr. Forsythe, and I would be happy to submit Dr. Chapman's testimony for the record if you would like.

Mr. Forsythe. I think we should have that.

Mr. Leggett. All right.

Mr. Forsythe. I would appreciate it.

[The material was not available at time of printing.]

Mr. Leggett. We ought to be getting that whole record from over there on a day-to-day basis, and if we are not, let us go ahead and do that.

Mr. Forsythe. I agree with you.

I have no further questions.

Mr. Leggett. Mr. Hughes.

Mr. Hughes. No questions, Mr. Chairman.

Mr. Leggett. Mr. Akaka.

Mr. Akaka. Yes, Mr. Chairman.

I see in your testimony that you put emphasis on tuna-porpoise problems.

Mr. Twiss. Yes.

Mr. Akaka. My question is, what are the problems you cite for 1978?

Mr. Twiss. One of the basic issues which we see facing further resolution of the tuna-porpoise problem is making optimum use of this dedicated research vessel that the industry has agreed to make available for a year.

The issues that we see associated with this are first: careful planning for effective use of that vessel; second: onsite management of the research activities; and third: forcing the scientists, technicians, et cetera to get their results together in a useful form as soon as possible after that cruise is completed.

We have offered to provide a scientific leader under contract to the Commission to coordinate planning, to be at sea for the entire cruise, and to ramrod the writing of reports quickly after the cruise is over. That would be a major part of the expenses.

In addition, funds would be provided for the chief scientist's own research activities while onboard.

Also, the Chairman of the Commission, the staff, and selected members of the Committee of Scientific Advisers will continue to work directly with the National Marine Fisheries Service, the industry, and others to refine survey techniques and plans, to review all research, and generally contribute constructively.

Roughly $196,000 was spent in fiscal year 1976, and I should think it would be in that neighborhood this year.

Mr. Akaka. Is that considered as a research effort?

Mr. Twiss. Yes; it is.

Mr. Akaka. Is that where part of the $100,000 will be going?

Mr. Twiss. Well, it depends upon where we cut the $100,000 from. A portion of it would certainly come from tuna-porpoise.

Mr. Akaka. You also mention a workshop in your testimony.

Mr. Twiss. Yes.

Mr. Akaka. What is the purpose of the workshop and what is the content of the workshop?

Mr. Twiss. The workshop mentioned in the testimony?

Mr. Akaka. Yes.

Mr. Twiss. The one which I mentioned was held in La Jolla in December 1975. At that workshop, all plans for the dedicated research vessel cruise which took place last fall were made. The basis for the behavioral cruise was developed out of the Commission's workshop. That was the *Elizabeth C.J.* cruise, for clarification.

Mr. Akaka. Thank you, Mr. Chairman.

Mr. Leggett. Thank you, Mr. Akaka.

Have any of you gentlemen ever seen a dugong?

Mr. Twiss. I have not.

Mr. Leggett. Mr. Akaka, have you seen a dugong?

Mr. Akaka. I have seen a picture of it.

Mr. Leggett. I hope somebody can give the committee a picture sometime.

Have you seen one?

Mr. Twiss. Yes; we have, in fact, pictures of dugongs.

Mr. Leggett. Very good.

Are you managing them effectively?

Mr. Twiss. We have not had a great deal to do with dugongs to date.

Mr. Leggett. If you ever find some, you will manage it very effectively?

Mr. Twiss. Yes, sir.

Mr. Leggett. That is really assuring.

Mr. Trible.

Mr. Trible. No questions.

Mr. Leggett. Counsel.

Mr. Mannina. Thank you, Mr. Chairman.

John, I understand that the Commission recently sponsored a meeting to discuss the permit procedures under the Marine Mammal Protection Act.

Can you submit to the committee the minutes of the meeting or what transpired and what recommendations should be made by this committee with respect to the permit systems?

Mr. Twiss. I shall submit the letters sent to Messrs. Schoning and Greenwald, summarizing the meeting and making certain recommendations.

Is that adequate?

Mr. Mannina. That letter will be adequate.

Could you advise the Committee on the present status of the care and maintenance standards which the Commission wrote and which, during the last oversight hearings back in, I believe, October of 1975, it was indicated they would be published in 4 months?

They are not published at this point?

Mr. Twiss. The standards have not been published by the Department of Agriculture. They say they will be published by April 1. This is the last in a long series of delays, and I view their estimate with great reservation.

If you would like, I would be glad to supply a letter covering the situation.

Mr. Mannina. Thank you.

[The following was received for the record:]

Marine Mammal Commission,
Washington, D.C., March 16, 1977.

Hon. Robert L. Leggett,
Chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment, U.S. House of Representatives, Washington, D.C.

Dear Mr. Chairman: In your hearings on March 15th, you asked about the status of the Marine Mammal Maintenance Standards and Guidelines. You requested an explanation as to why the Department of Agriculture had not yet published the Standards for public comment.

At its first meeting in 1974, the Commission recognized the need to develop uniform standards to measure the adequacy of holding facilities and practices. It established a special subcommittee of the Committee of Scientific Advisors to develop standards. Information and comments on the subcommittee's draft proposals were solicited from specialists in the United States and abroad.

Based upon information on the biological needs of captive animals, the Commission's recommended Marine Mammal Maintenance Standards and Guidelines were transmitted to the Departments of Agriculture, Commerce, and the Interior on 20 October 1975. The Commission recommended that they be adopted and that appropriate provisions and arrangements be developed for their uniform administration and application, including inspection and enforcement. The Standards and Guidelines were designed to ensure the welfare of captive marine mammals in compliance with the provisions of the Marine Mammal Protection Act and the Federal Laboratory Animal Welfare Act. We believe that their use will improve the health of captive marine mammals, ensure humane treatment, and reduce the need to remove marine mammals from wild populations.

We have received repeated assurances, all unfulfilled, from the Department of Agriculture as to publication. The Department's latest word is that they expect to publish the Guidelines and Standards by 1 April 1977.

Sincerely,

John R. Twiss, Jr.,
Executive Director.

Mr. Eisenbud. Could I clarify for the record, please?

The standards are to be published by the Department of Agriculture and not the Marine Mammal Commission. It should be understood that we do not have authority to publish standards.

Mr. Mannina. The source of delay has been with the Department of Agriculture?

Mr. Twiss. It has.

Mr. Mannina. Thank you, Mr. Chairman.

Mr. Leggett. Any further questions?

If not, gentlemen, thank you. You have been helpful.

We will await your analysis before we mark up this legislation.

Now, Christine Stevens, very nice to have you here.

STATEMENT OF CHRISTINE STEVENS, SECRETARY, SOCIETY FOR ANIMAL PROTECTIVE LEGISLATION

Mrs. Stevens. Thank you very much, Mr. Chairman.

Mr. Leggett. Do you have a prepared statement?

Mrs. Stevens. Just a very brief one.

Mr. Leggett. OK.

That statement will be included in our record at this point and you are here representing the Society for Animal Protective Legislation.

[The following was received for the record:]

STATEMENT OF CHRISTINE STEVENS, SECRETARY, SOCIETY FOR ANIMAL PROTECTIVE LEGISLATION

On behalf of the Society for Animal Protective Legislation, I wish to express support for H.R. 4740 to authorize increased appropriations for implementation of the Marine Mammal Protection Act.

The need for a full observer program is well established, and the proposed increases should make that possible as well as allowing adequate funds for enforcement activities and general administration of the Act in an orderly manner.

The increase in research funds to be administered by the Marine Mammal Commission is highly desirable too, at this critical period in the Act's existence. The remarkable progress made by a single scientific cruise by the Elizabeth C.J. demonstrates the value of such funding. The Marine Mammal Commission has played a valuable role in advancing the purposes of the Act, and may be expected to develop into an increasingly effective advisory body as it gains experience.

Mr. Chairman, we commend your forward looking action in proposing the authorization that is needed to provide the protection the Congress called for when the Marine Mammal Protection Act was passed.

Mrs. STEVENS. Yes.

Mr. LEGGETT. You are not responsible for putting dugongs in the bill, are you?

Mrs. STEVENS. I think all marine mammals should be in the bill.

Mr. LEGGETT. Have you ever seen a dugong?

Mrs. STEVENS. No; I am sorry to say I have not. But I would like to.

Mr. LEGGETT. Milton, have you seen a dugong?

Colonel KAUFMANN. Pictures. They are the original mermaids. They allegedly give rise to the birth of mermaids.

Mr. LEGGETT. I kind of wonder why we are not protecting the Loch Ness monster, too. We have not seen many of those, but we have heard of them.

Mrs. STEVENS. We do not think they are mammals.

Mr. LEGGETT. Well, how can you prove it is a fish?

All right.

Mrs. STEVENS. Mr. Chairman, I really cannot speak to this issue technically, in the detail you have heard from the Government witnesses. It is simply that we want to express strong support for the increases which you put in the bill, which we are delighted to see.

I would add to my statement, that the Department of Interior has been badly criticized for lack of enforcement, and that is the reason, or one of the reasons that has been put forward by the State of Alaska, that it should take over the management.

So I certainly hope that more money for enforcement can go into all of these programs, because it has been inadequate with every agency, and it is causing this problem in Alaska.

We do not like to see the management put back in the State, because we do not think the State has a good record. This is all the more reason why there should be larger appropriations for enforcement by the Federal Government throughout.

Mr. LEGGETT. Of course, the States have shown better capability to relate to control indigenous taking.

Mrs. STEVENS. Yes.

Mr. LEGGETT. Subsistence taking.

Mrs. STEVENS. Yes; that is true.

Mr. LEGGETT. And then you know, that is—you know, that is a peripheral matter of some substance.

Mrs. STEVENS. I recognize that. But there is a problem that there are not enough personnel out there in the Department of Interior to handle either indigenous or other kinds of taking, and that has been brought up repeatedly.

However, the State of Alaska laws are not as strict as the Marine Mammal Act with respect to the actual protection of the animals, and that is our reason for objecting to transfer, unless those laws are changed.

I would hope—I had hoped, and apparently erred, that the amount of money approved would apply to a 100-percent observer program on the tuna boats.

Mr. LEGGETT. Well, we intend to put 100 percent observer funds in this supplemental, and we will see about getting those people.

Right now the question is kind of moot, because the status of the existing regulation is such that the industry is simply not fishing.

So we will have to see what we can do about that.

Mrs. STEVENS. Well, Thank you, Mr. Chairman.

We certainly appreciate the increase that you proposed, and support it strongly.

Mr. LEGGETT. Very good.

I hope you similarly appear before the Appropriations Committee at the appropriate time.

Mrs. STEVENS. Absolutely. But is that immediately?

Mr. LEGGETT. I do not know when they are scheduled. We ought to find out when the Appropriations Committee is holding hearings on these subject areas.

We have testimony in the past, both before Mr. Slack's committee, and Mr. Yates' committee. Both vary difficult committees. They seem to value the dollar considerably different than we do.

All right.

I think we value it better.

Milt?

STATEMENT OF COL. MILTON M. KAUFMANN, PRESIDENT, MONITOR, INC.

Colonel KAUFMANN. Mr. Chairman, I am Milton M. Kaufmann, president of the Monitor consortium.

I am speaking specifically today for the Defenders of Wildlife, International Fund for Animal Welfare, Humane Society of the United States, Fund for Animals, Friends of the Earth, and the American Littoral Society.

I do not have a prepared statement, Mr. Chairman, but my statement also will be brief.

We support H.R. 4740, modified as necessary to provide authorization for the following:

One, an observer on all trips, to be appropriated only if the National Marine Fishery Service is unable to levy license fees adequate to pay the cost of the observer program.

Two, a $5 million annual level of research and development expenditure on tuna-porpoise. It would be understood that this would be actually appropriated to the level necessary to supplement the industry's contribution towards a total $5 million program.

It is our understanding at the present time their planning calls for about a $2 million to $2.5 million contribution, which I believe includes the cost of the dedicated vessel.

Three, provide per diem travel and related expenditures to citizens serving as official members of the U.S. delegations, or attending meetings at the request of the U.S. Government relating to the administration of the Marine Mammal Protection Act of 1972.

Mr. LEGGETT. We already covered that with the other witnesses, and I think that is an item that should be taken care of.

Colonel KAUFMANN. Fine.

I very much appreciate your support of this concept, and your instructions to counsel to draft a paragraph on this.

I believe perhaps that I expanded the concept that was identified earlier this afternoon, beyond members of U.S. delegations, to include attendance at meetings at the request of the Government, such as the scientific workshop at La Jolla.

Mr. LEGGETT. We would call them official observers, observers who have been requested to appear by the administration, and we would provide discretion to the administration to provide per diem and travel expenses for those persons who are requesting.

Colonel KAUFMANN. It would be extremely helpful, sir.

One final remark. I am concerned with the orientation of the National Marine Fisheries Service, as indicated in Mr. Gehringer's testimony this afternoon, which asks specifically for additional funding under the act to determine the impact of growing populations of marine mammals on fishing stocks.

We feel that under the act as interperted by Judge Richey, this statement is perhaps in reverse.

The thrust of the act is protection of marine mammals. In our view, in this subject area, additional funds are only justified to determine the effect of increased fishing on optimum sustainable population level of marine mammals, and man's fishing activities.

It is a question of emphasis, sir.

Mr. LEGGETT. You are right.

Colonel KAUFMANN. That concludes my testimony, sir.

Mr. LEGGETT. Very good.

Any questions?

Mr. FORSYTHE. No.

Mr. LEGGETT. All right.

We generally agree with you. Thank you very much.

You have been very helpful, as usual.

This meeting will now stand adjourned, and I would not propose to mark up this legislation until we get the backup material that we requested of the official witnesses.

[Whereupon, at 4:04 p.m., the subcommittee adjourned, subject to the call of the Chair.]

○

BOSTON PUBLIC LIBRARY
3 9999 00179 973 1

Boston Public Library
Copley Square

GENERAL LIBRARY

KF27
.M447
1977

9800156096

The Date Due Card in the pocket indicates the date on or before which this book should be returned to the Library.

Please do not remove cards from this